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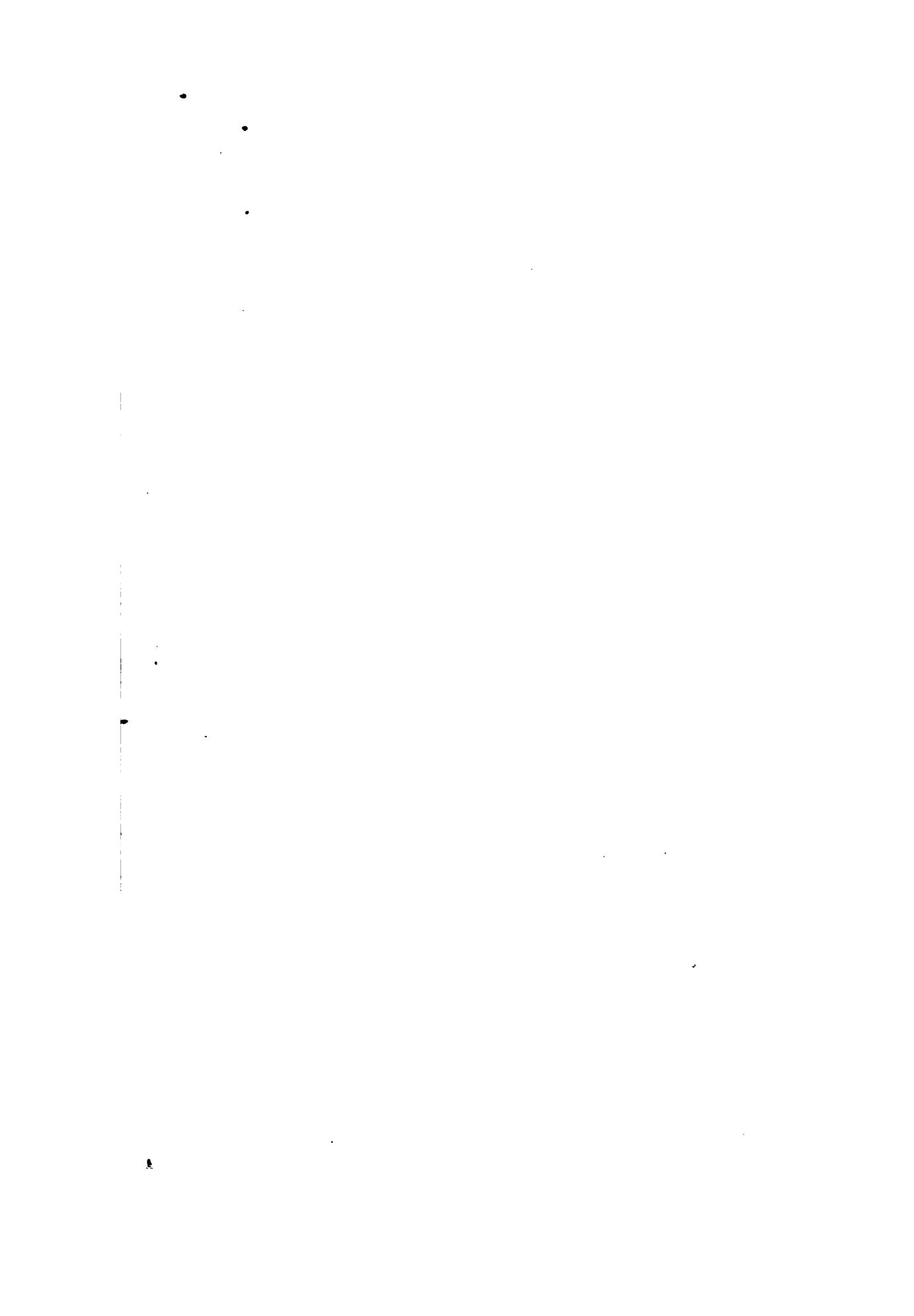
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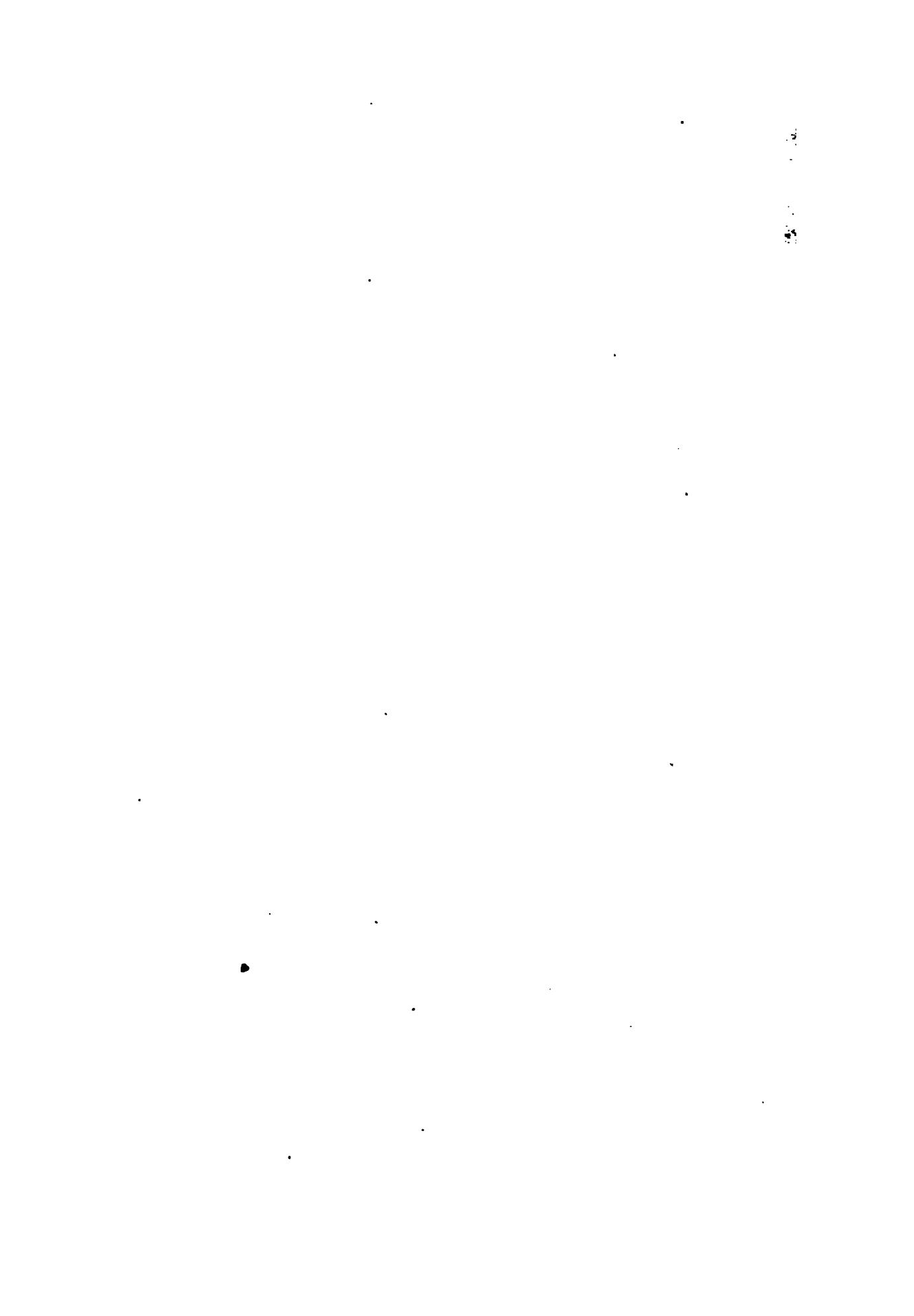
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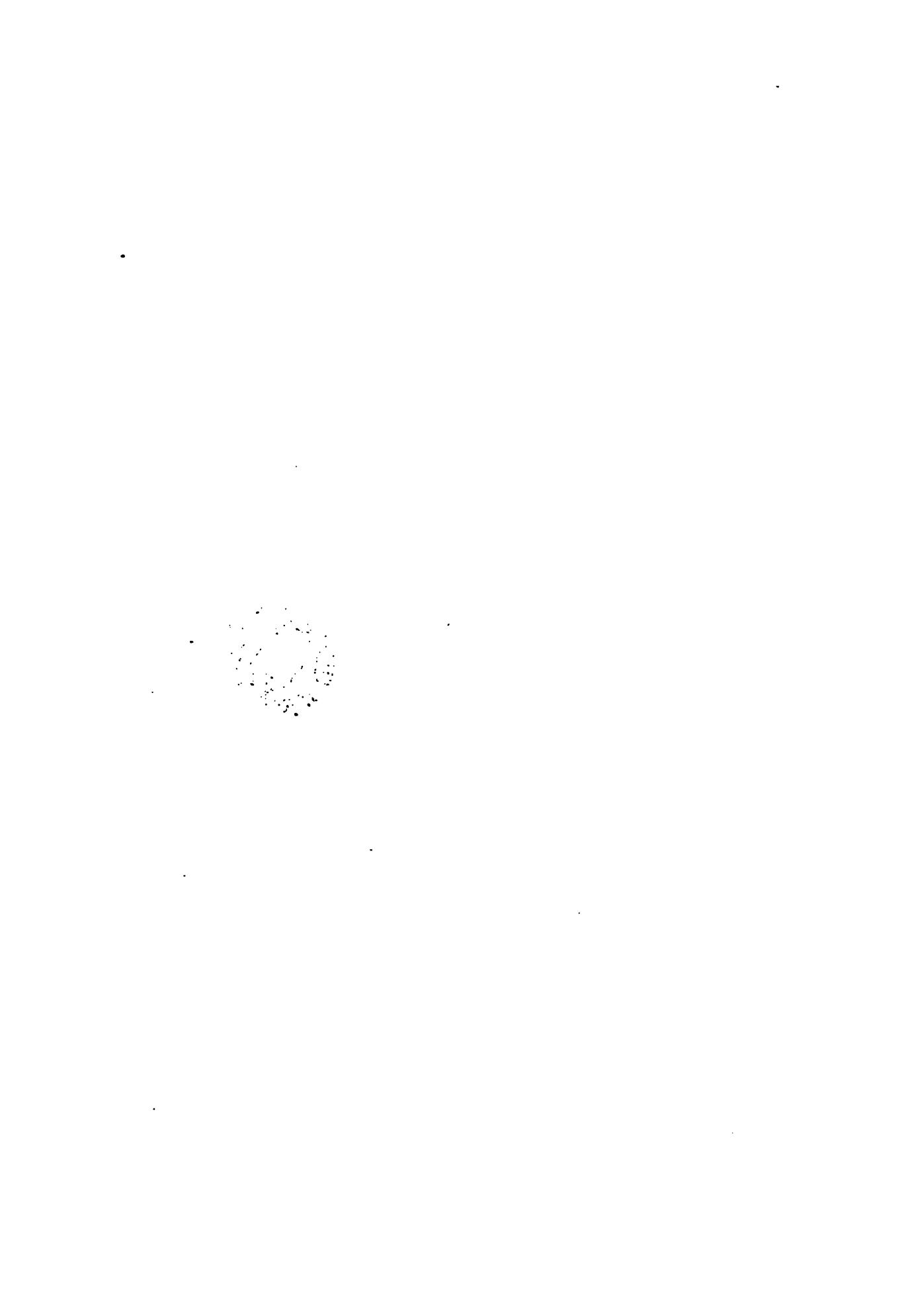
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REPORTS OF CASES

HEARD AND DETERMINED

BY

THE LORD CHANCELLOR,

AND THE

Court of Appeal in Chancery.

—

BY

J. P. DE GEX,

F. FISHER,

AND

H. CADMAN JONES,

OF LINCOLN'S INN, ESQUIRES, BARRISTERS AT LAW.



—

VOL. II.

1860—1861.

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R E P O R T S
OF
C A S E S
A R G U E D A N D D E T E R M I N E D
I N T H E
H I G H C O U R T O F C H A N C E R Y.

In the Matter of JAMES STEWART, a person of unsound mind; and

In the Matter of the Trusts of the Will of JOHN STEWART, deceased; and

In the Matter of the TRUSTEE ACT, 1850.

1860.
March 23.
April 23, 27.
May 4.

Before The
LORDS JUS-
TICES.

A sum of stock
was standing
in the name of
a person of
unsound mind,
part of such
stock being his
own benefi-
cially and part
of it being

vested in him as trustee. The Court had made an order appointing new trustees, and vesting in them the right to call for a transfer of the trust stock and to receive the arrears of dividends. It was found that an order in this form could not be acted on as to the arrears of dividend, since the bank could not pay arrears on part of a sum. The Court therefore varied the order so as to enable the new trustees to receive the past dividends on the whole sum of stock and to retain for the purposes of the trust that portion which had accrued due in respect of the trust stock.

Vol. II—1.

B

D.F.J.

CASES IN CHANCERY.

1860.

In re
STEWART.

the circumstance that there was also standing in the name of the trustee stock of the same description, of which he was the beneficial owner, so that in the books of the bank the trust stock and his own stock formed only one single aggregate sum. The bank authorities, therefore, could not pay the past dividends on the trust stock to the new trustees, since the administrative arrangements of the bank provide no method of paying the dividends on any portion of an integral sum separately from those due in respect of the residue.

May 4. The matter, having been mentioned several times, now came on to be finally spoken to.

Mr. *Rumsey* for the Petitioners.

The Petitioners submit that the difficulty in this case may be got over by so framing the order, that the new trustees may be enabled to receive the whole of the past dividends, and to retain the portion of them which belongs to the trust. The act provides that the word "trust" shall extend to implied and constructive trusts, and to cases where the trustee has some beneficial estate or interest in the subject of the trust. Now it is clear that if the trustee had remained of sound mind, he would have been obliged to pay to the cestuis que trust the dividends on the trust stock, and as the practice of the bank renders the right to receive dividends indivisible, he would have been compelled to draw out his own dividends in order to obtain those which he was bound to pay. There is, therefore, an implied or constructive trust, extending, not over the whole stock, perhaps not even over the whole dividends, but clearly over the right to receive the whole dividends; and the Court has power to transfer that right to the new trustees.

The

The LORD JUSTICE TURNER asked how, in the event of the order being made, it was proposed to deal with the dividends in which the old trustee was interested beneficially, the Court having no jurisdiction on the present application to make any order with respect to the mode of dealing with them.

Mr. *Rumsey* stated that the new trustees had not determined on any course, but thought of investing the sums in question in the name of the old trustee.

Their LORDSHIPS then made the order, enabling the new trustees to receive the past dividends on the whole sum of stock.

1860.
In re
Stewart.

In the Matter of the Trusts of the Will of RALPH
NEWTON, deceased.

THE trustees of the will of *Ralph Newton*, being desirous to pay a sum into Court under the "Act for the Relief of Trustees," made the affidavit required by the act. This affidavit was properly intituled in the matter of the particular trust, and in the matter of the act, but was headed as follows:—

"The joint and several affidavit of *William Gray*,
of &c., *Richard Attenborough*, of &c., and
John Thomas Soden Bromhead, of &c."

"We, the said *William Gray*, *Richard Attenborough*
and *John Thomas Soden Bromhead*, say as follows."

And at the foot was the usual jurat: "Severally sworn
by the said deponents *William Gray*, *Richard Atten-
borough* and *John Thomas Soden Bromhead*, at —,

May 4.
Before The
Lords Jus-
tices.

An affidavit,
instead of
being headed
as usual, "We,
A. B., *C. D.*
and *E. F.*,
severally make
oath and say,"
was headed
"The joint and
several affida-
vit of *A. B.*,
C. D. and
E. F. We the
said *A. B.*,
C. D. and *E.*
F. say as fol-
lows." Leave
to file it was
refused.

CASES IN CHANCERY.

1860.

~~~~~  
In re  
NEWTON.

this 28th day of *April*, 1860, before me *A. P.*, a Commissioner to administer oaths in Chancery in *England*." The Clerks of Records and Writs refused to file this affidavit, considering it irregular.

*Mr. Bowring* applied to the Court for a direction that the affidavit should be received and filed.

*Mr. Murray*, Clerk of Records and Writs, attended by the desire of their Lordships, and stated his objection. He said that the heading was irregularly framed upon the plan of an answer, the insertion of the description "the joint and several affidavit, &c." being quite unprecedented, but that the material objection was, that the deponents merely used the expression "say" instead of "make oath and say." He referred to *Phillips v. Prentice* (a).

*Mr. Bowring* contended that there could not be any objection to using in an affidavit the form of words which was settled by the General Orders of the Court as the proper form in an answer. That the omission of the words "make oath" was cured by the jurat and by the description in the heading. He further stated that the trustees were resident in different parts of the country, and that to have the affidavit altered and re-sworn would cause much trouble, delay and expense, and urged that under those circumstances the Court might order the present affidavit to be filed, not allowing the case to be a precedent.

*The LORD JUSTICE KNIGHT BRUCE.*

There is in the form of this affidavit a variation not clearly immaterial from the form sanctioned by the established

(a) 2 *Hare*, 542.

blished practice. It is, in my judgment, the safer course to refuse the application.

1860.

—  
In re  
NEWTON.

*The Lord Justice Turner.*

I do not think it desirable that the Court should give any encouragement to uncalled-for deviations from established forms. The affidavit must be altered and re-sworn.

In the Matter of the Settled Estates of RICHARD BENYON DE BEAUVOIR, deceased, and

In the Matter of THE BERKS AND HANTS RAILWAY ACT, 1845; THE COMPANIES CLAUSES CONSOLIDATION ACT, 1845; THE LANDS CLAUSES CONSOLIDATION ACT, 1845; and THE RAILWAYS CLAUSES CONSOLIDATION ACT, 1845.

May 4.  
Before The  
Lords Jus-  
tices.

An estate stood limited to B. for life, with remainder to his first and other sons successively in tail, remainder to B. in fee. B. made his will, devising all his real estate in strict settlement.

After the date of B.'s will a company purchased from him part of the estate under the powers of the Lands Clauses Act, and paid his the purchase-money into

THIS was a petition by way of appeal, the object of which was to vary an order of Vice-Chancellor *Kindersley*, by directing a railway company to pay the costs of a re-investment in land.

The Petitioner was the tenant for life of estates, part of which had been taken by the *Berks and Hants Railway Company*, whose undertaking had subsequently become incorporated with that of the *Great Western Railway*.

*Peter de Beauvoir*, by a will made in 1800, devised his the purchase-money into

Court. B. died without issue:—*Held*, that the company must pay the costs of investing the purchase-money in real estate, to be settled to the uses of the will.

Whether if B. had died intestate his heir at law would not have been entitled to an investment in land at the expense of the company, *querre*.

**1860.**      his real estate to *Edward Benyon* for life, with remainder to the first and other sons of *Edward Benyon* successively in tail male, with remainder to *Charles Benyon* for life, remainder to his first and other sons successively in tail male, with remainder to *Richard Benyon de Beauvoir* for life, with remainder to his first and other sons successively in tail male, and for default of such issue to the testator's own right heirs, the usual limitations to preserve contingent remainders being engrafted on each life estate.

*In re  
De Beauvoir.*

The testator died in 1821. *Edward Benyon* and *Charles Benyon* had died without issue in his lifetime. *Richard Benyon de Beauvoir* was his heir at law, and so upon his decease became tenant for life in possession and also entitled to the reversion in fee. After the testator's death other real estates were conveyed to the uses of his will.

*Richard Benyon de Beauvoir* made his will, dated the 9th of July, 1844, by which he devised all his real estates to trustees, upon trust to settle them in manner therein mentioned. This settlement, except as to certain estates not situate in *Hampshire* or *Berkshire*, was to be to the use of the Petitioner *Richard Benyon* for life, with remainder to his first and other sons successively in tail male, with divers remainders over, and subject to a shifting clause which had not taken effect. He bequeathed his personal estate to the same trustees upon trust to invest it in the purchase of land to be settled to the same uses. The will did not contain any power under which the land taken by the company could have been sold.

In 1846 and 1848 the *Berks and Hants Railway Company*, under the powers of their act, with which the Lands

Lands Clauses Consolidation Act was incorporated, purchased parts of the estates in *Hampshire* and *Berkshire* subject to the uses of *Peter de Beauvoir's* will for sums amounting together to 6,795*l.* 12*s.* 6*d.* These monies were paid into Court and invested in the purchase of 7,290*l.* 18*s.* 11*d.* Bank £3 per Cent. Annuities, "The Account of the Estate settled to the Uses of the Will of the Reverend *Peter de Beauvoir*, deceased."

1860.

In re

*Ds Beauvoir.*

*Richard Benyon de Beauvoir* died in 1854, without issue, and the reversion in *Peter de Beauvoir's* estate thus fell into possession. On the 1st of *January*, 1855, a settlement of *Richard Benyon de Beauvoir's* estates in *Hampshire*, *Berkshire* and several other counties, including those which had been subject to the uses of the will of *Peter de Beauvoir*, was executed in conformity with the trusts of *Richard Benyon de Beauvoir's* will. This settlement purported to include all estates to be purchased with the 7,290*l.* 18*s.* 11*d.* Consols.

*Richard Benyon*, as tenant for life in possession, now presented his petition, praying an inquiry whether the purchase of a certain estate for 6,250*l.* would be a proper purchase for investing part of the fund in Court, and that if the Court approved of the purchase and a good title was shown, the estate might be conveyed to the uses of the settlement of the 1st of *January*, 1855, and the purchase-money be raised out of the fund in Court, and that the company might pay the costs of the re-investment in the usual way.

Vice-Chancellor *Kindersley* made an order in conformity with the prayer, except as to costs. He ordered that the company "do pay unto the Petitioner his costs of this application and of this order, to be taxed by the Taxing

1860.  
 In re  
**De Beauvoir.**

*Mr. Baily and Mr. Erskine* for the Appellant.

We submit that the only question here is whether the fund remains real estate. If so, it must be laid out in land, to be settled to the uses of the will; there is no one entitled to receive it as money; and under the 80th section of the Lands Clauses Act the company must pay the costs. [*The LORD JUSTICE TURNER*: The act seems only to contemplate a conveyance to the uses to which the land was subject at the time of the company's purchase.] That may be so; we do not object to a conveyance to the old uses. [*The LORD JUSTICE KNIGHT BRUCE*: Suppose the land had stood limited to Mr. *Benyon de Beauvoir* for life, remainder to *A. B.* in tail, remainder to Mr. *Benyon de Beauvoir* in fee, and *A. B.* had died without issue in the lifetime of Mr. *Benyon de Beauvoir*, how do you say that your case would then stand?] We should contend that even in that case the money must be re-invested in land, at the expense of the company; but that case is much more favorable to the company than the present. In the case supposed *Benyon de Beauvoir* would in his lifetime have acquired a right to call for payment of the money to himself: in our case he clearly never had any such right. [*The LORD JUSTICE KNIGHT BRUCE*: Suppose a tenant for life of land which has been taken by a company buys the reversion, does he or does he not thereby give up his right to have another estate bought at the expense of the company?] We submit that he does not, though, for the reason already given, it is not necessary to carry our argument to that length. Any case where there is even for a single moment a person who has an absolute beneficial interest in the fund is quite distinguishable from this. The act evidently intends to make the power of the Court

Court to give costs co-extensive with the direction to invest in land, and the company must pay costs in every case in which there is not and never has been any person entitled to receive the money as money, and where, consequently, a re-investment in land must be ordered. Here *Benyon de Beauvoir* never had a right to receive the money: the trustees of his will have no right to receive it. If the land had been taken from them they could not have received the money, as they have no power of sale, and therefore could only have sold under the powers of the act. To hold the present case to be without the act would introduce an anomaly. If we were asking to have the money applied in paying off an incumbrance affecting the residue of the estates we should be within the express words of the act, and there is no distinction between that case and this in principle. Even if *Benyon de Beauvoir* had made no will, we submit that the company must have paid the costs of a re-investment in land on the application of the heir. We do not dispute that a person who at the time of the purchase was absolute owner of the land has no such right, but there is no authority showing that the fact of a person's subsequently becoming absolute owner takes away the liability which has once attached on the company to pay the costs of re-investment.

1860.

In re

De BEAUVOIR.

Mr. T. Stevens for the company.

The 69th section of the act provides, that the money deposited in Court may be invested in the purchase of land, "to be conveyed, limited and settled upon the like uses, trusts and purposes, and in the same manner, as the lands in respect of which such money shall have been paid stood settled," and it is only where the purchase answers this description that the company are liable to pay costs. The fact of the land being settled and not belonging absolutely to any one is what

1860.

In re  
DE BEAUVOIR.

what the legislature regarded as causing the necessity for re-investment, the terms of the act do not provide for settling land to the uses of some subsequent instrument. Here the land cannot be conveyed to the uses of the old settlement—they are completely gone—a conveyance to those uses would be a conveyance to the use of a number of dead people ; this, therefore, is not a purchase within the provisions of the act. [The LORD JUSTICE KNIGHT BRUCE : May not the expression in the 69th section of the act mean that the land in which the money is to be re-invested is to go as the purchased land would have gone if not purchased ?] Suppose *Benyon de Beauvoir* had died intestate, could his heir have come here for a re-investment in land ? The point has never been decided, but the general understanding is, that he could not. Then why should a devise by *Benyon de Beauvoir* throw extra costs upon the company ? [The LORD JUSTICE TURNER : The act (sect. 69) says that the funds in Court shall remain so deposited, “ until the same be applied to some one or more of the following purposes (that is to say), &c.” Who is to elect to which of these purposes they shall be applied ?] The Court. [The LORD JUSTICE TURNER : Have not the parties interested the right of election ?] Assuming that they have it in general, still it does not follow that a person becoming absolutely entitled has a right to re-investment in land. The original ground for a re-investment in land has determined, and the act does not contemplate a re-investment the necessity for which arises only from subsequent dealings with the property.

Mr. *Baily* in reply.

However the case may be, where a person becomes absolutely entitled, the right to a re-investment in land at the expense of the company must continue so long as the fund is so limited that there is no person competent to take it out of Court.

*The*

*The LORD JUSTICE KNIGHT BRUCE.*

1860.

In re  
DE BEAUVOIR.

I agree with the Vice-Chancellor that, this will having been made before the purchase by the company, which took place between the date of the will and the death of the testator, the purchase-money, or the stock representing it, cannot be paid to the tenant for life under Mr. *Richard Benyon de Beauvoir's* will, or to the trustees of that will, but can only be paid or transferred for the purpose of effecting a purchase of land directly. If so, the purchase, I agree also with the Vice-Chancellor, must be by the direction or with the interposition of the Court.

The question then is by whom the costs of that purchase are to be paid. I am of opinion that it does not exceed the legitimate interpretation of the act to say that they must be paid by the company in the same way as if Mr. *Richard Benyon de Beauvoir* were still alive and were seeking a re-investment in land. I think that the accident of his death, by which the intermediate limitations between his life estate and the ultimate reversion in fee failed of effect, cannot make any difference. The letter of the clause, on which Mr. *Stevens* properly and ably argued, is not so strong against the claim of the Petitioner as to make it right to effect so plain and direct a contradiction of its spirit. In my judgment, therefore, there must be an investment in land, and the company must be ordered to pay the costs of that investment. Some strong cases have been suggested; and I can imagine some in which it might be right to relieve the company from some part of the costs. These cases must be provided for when they happen, if they ever shall happen. Here we are only at the first step, a settlement by the owner of a reversion in fee; and this is not a case in which there is, in my judgment, sufficient reason for relieving the company from any part of the costs.

*The*

1860.

In re  
De Beauvoir.

*The LORD JUSTICE TURNER.*

I agree with Mr. *Stevens* that in determining this question we cannot go beyond the act of parliament, and that whether we can give costs depends on the construction of the act. The question turns upon the meaning of the words in the 69th section of the act, "such monies shall remain so deposited until the same be applied to some one or more of the following purposes (that is to say):—In the purchase or redemption of the land tax or the discharge of any debt or incumbrance affecting the lands in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts or purposes; or, in the purchase of other lands to be conveyed, limited and settled upon the like uses, trusts and purposes, and in the same manner as the lands, in respect of which such money shall have been paid stood settled; or, &c.; or in payment to any party becoming absolutely entitled to such money."

Does this mean at the election of the applicant or of whom? I do not think it necessary to give a concluded opinion on this point, for in the present case there never was a time when any person could have taken the fund out of Court as absolute owner. Was Mr. *Benyon de Beauvoir* then precluded from devising the estate? The legislature must have known that an estate circumstanced like this might be devised, and new uses created, and we must construe the words "to be settled upon the like uses, trusts and purposes, and in the same manner as the lands in respect of which such monies shall have been paid stood settled," so as to give effect to the intention, and must therefore hold them to include derivative uses. There is weight in Mr. *Erskine's* argument, founded on the first part of the clause, which provides that

that the money may be applied in discharging incumbrances affecting the lands in respect of which the money has been paid, or other lands "settled therewith," a direction which must extend to a case where derivative uses have been created, and shows the intention of the legislature to have been that the clause should extend to cases where the uses may have been changed. Without, therefore, giving any opinion whether an owner in fee can come to have a re-investment in land at the expense of the company, I think that under the circumstances of this case, there never having been a person who could claim payment of the money, the Petitioner is entitled to have it re-invested in land at the cost of the company. I do not intend to intimate that an owner in fee could not claim a re-investment, I am rather disposed to think that he could, though I do not bind myself to that view, or mean to go further than to say that at present I think that it must be at the option of the claimant, to which of the purposes mentioned in the 69th clause the money shall be applied.

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In re  
De BEAUVOIR.

1860.



In the Matter of the LANDS CLAUSES CONSOLIDATION  
ACT, 1845; and

In the Matter of the Act 14 & 15 Vict. c. 104, "AN ACT  
TO FACILITATE THE MANAGEMENT AND IMPROVE-  
MENT OF EPISCOPAL AND CAPITULAR ESTATES IN  
ENGLAND," &c. &c.

Ex parte THE BISHOP OF LONDON.

*May 25.*

Before *The  
LORDS JUS-  
TICES.*

A bishop presented a petition to have monies which had been paid into Court by several railway companies for lands taken from the see applied in buying up a lease of other land belonging to the see:—

*Held*, that, taking together the Lands Clauses Consolidation Act and the Episcopal and Capitular Estates

Act, the companies must

pay costs in the same way as if the purchase had been of freehold lands.

*Held*, also that the petition ought not to have been served on the Ecclesiastical Commissioners, but their consent out of court obtained and proved, and that the companies ought not to pay the costs of their appearance.

*Held* also, that the costs ought to be borne by the companies in equal shares, except the costs of the ad valorem stamp on the assignment, which ought to be borne by them rateably according to the amounts which they contributed respectively to the purchase-money.

Mr.

The material questions which arose were as to the costs of the re-investment, the first being whether the companies were to bear the costs at all, and the second, how the costs, if ordered to be paid by the companies, were to be apportioned among them.

Mr. Kent appeared for the Petitioner.

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Ex parte  
THE BISHOP  
or LONDON.  
Mr. Baggallay, Mr. Haynes, Mr. Martindale, Mr. Osler, Mr. Robinson, Mr. Shebbeare, Mr. Wickens and Mr. Knox Wigram for the different Respondents.

For the Petitioner, it was urged, on the first point, that the 7th section of 14 & 15 Vict. c. 104 (The Episcopal and Capitular Estates Act) by which it is enacted, that "all other monies, stocks, funds and securities for the time being subject to be invested in the purchase of lands to be conveyed to the use or for the benefit of any ecclesiastical corporations may, with such approval as herein mentioned" [i. e. the approval of the Church Estates Commissioners] "be applied in or towards the purchase of the estates or interests of lessees in any lands belonging to such corporation, or of the estates or interests of any holders of copyhold or customary land of any manor belonging to any such corporation, or in or towards payment for equality of exchange under this act," was to be read together with the Lands Clauses Act, and placed the purchase of the interests of lessees on the same footing for all the purposes of the latter act as the purchase of freehold estates, so that the companies must pay the costs of re-investment, as provided by the Lands Clauses Act in the case of a re-investment in land to be settled upon and for the same uses, trusts or purposes.

On behalf of the Respondents it was urged, that they were not liable to pay costs, except as directed by the Lands Clauses Consolidation Act; that the 69th section of that act did not authorize a purchase of leaseholds, so that the application of the money as now asked could not be treated as a purchase under that act, though it might be effected as the "discharge of an incumbrance;" *Re Manchester,*

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**Ex parte
THE BISHOP
OR LONDON.**

Manchester, Sheffield and Lincolnshire Railway Company (a); that the Lands Clauses Act provided that the company should pay the costs of a purchase of land to be settled to the same uses as the land taken, but did not make them liable for the expenses of applying the money in the discharge of incumbrances, and that therefore the companies in the present case, if the purchase were to be treated as made under that act, were not liable to pay any further costs than would have been occasioned by a petition to have the money paid out; and that if the purchase were treated as made under the Capitular Estates Act, there was no jurisdiction to make them pay costs at all.

It was also urged that the costs of the appearance of the Church Estates Commissioners by counsel ought not to be allowed against the companies, as it was not necessary that their consent to the purchase should be given in Court.

As regarded the apportionment of the costs, if ordered to be paid by the companies, some of the companies contended that they ought to be apportioned according to the amounts of the sums paid into Court by the companies respectively, a plan which had been adopted in several similar cases. Others of the companies contended that the costs ought to be borne in equal shares; *London and Brighton Railway Company v. Shropshire Union Railway, &c. Company* (b); for that there was no necessary connection between the expenses of a purchase and the amount of the purchase-money; that if indeed a large purchase included several properties which the vendor held by different titles, the expenses would be greater than if only one of the properties were purchased;

(a) 21 *Beav.* 162.

(b) 23 *Beav.* 605.

chased ; but that nothing of that kind occurred here ; and the only effect which the amount of the purchase money had upon the expenses was that the ad valorem stamp was heavier.

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Ex parte
THE BISHOP
OF LONDON.

The LORD JUSTICE KNIGHT BRUCE.

Reading the Lands Clauses Consolidation Act together with the Episcopal and Capitular Estates Act, the expenses of the proposed purchase ought, I think, to be borne by the companies. The Petitioner must however pay the costs of the Church Estates Commissioners, the service of the petition on them having been unnecessary, as the order might have been made upon proof of their consent in writing to the investment sought. As regards the mode of apportioning the costs, if there is any settled rule on the subject, I shall not be disposed to depart from it; but I do not see any such necessary connection between the amount of purchase money, and the amount of costs, as would incline me to lay down any general rule for apportioning costs rateably, according to the amounts of the sums forming the purchase money.

The LORD JUSTICE TURNER concurred : And their Lordships inquired of the Registrar whether there was any settled practice in cases of this description. It appeared that there was not, and ultimately the order was settled in the following form :—

[Usual inquiry as to title, and in case a good title can be made, direction that a proper conveyance or assignment be settled by the judge.]

And it is ordered that, upon the due execution thereof by such parties thereto, as the judge shall for that purpose direct, such execution to be certified by the Chief Clerk, the following sums of stock standing in the name of the

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Accountant-General, in trust in the following matters and accounts, (that is to say):—[Here followed an enumeration of fourteen sums of stock, standing to different accounts, being the whole sums standing to those respective accounts.]—And 660*l.* 19*s.* 1*d.* Bank £3 per Cent. Annuities, in trust, *Ex parte the Great Northern Railway Company, In the Matter, &c.*, or so much of the last-mentioned sum of stock, as with the money to arise by the sale of the several other sums of stock aforesaid, and 5*l.* 11*s.* 10*d.* cash in the bank, to the credit of &c., will raise the sum of 15,480*l.*, be sold. And it is ordered, that in case of any deficiency so much, or if necessary the whole, of the sum of 749*l.* 14*s.* 2*d.*, Reduced Annuities, standing in the name of the Accountant-General, in trust, *Ex parte the Copyhold Commissioners, the Account of the Bishop of London*, as, with the money to arise by sale of the said other sums of stock and the said cash, will raise the said sum of 15,480*l.*, be also sold. [Direction to pay the money to the persons to be named in the certificate of execution.]

Refer it to the Taxing Master to tax and settle the costs of the Petitioner of the following matters, including therein all reasonable charges and expenses incident thereto, (that is to say,) his costs of the investment of the said 15,480*l.* in the purchase aforesaid, and of obtaining this order, and of all proceedings relating thereto (except such costs, if any, as are occasioned by litigation between adverse claimants).

And it is ordered that, in such taxation, the Taxing Master do distinguish the costs of the ad valorem stamp upon the assignment or conveyance of the estate or interest in the said lands under the said lease to the Petitioner.

And it is ordered that [the several bodies, out of whose funds

funds the purchase money was to be made up, including the *Great Northern Railway Company*] do pay to the Petitioner his said costs, charges and expenses, when taxed and settled (except such costs as are herein-before directed to be distinguished) in equal proportions, and do pay the costs so to be distinguished rateably in proportion to the amount which the monies to arise by the sale of the several sums of stock standing to the several accounts aforesaid, together with the cash to the like respective accounts, are to contribute to make up the said sum of 15,480*l.*, the amount of such equal and rateable proportions to be certified by the Taxing Master.

And it is ordered, that the Taxing Master do tax the costs of the Church Estates Commissioners, and of the Copyhold Commissioners of appearing on this application; and it is ordered, that so much of the said 749*l.* 14*s.* *2d.* Reduced Annuities in trust in the matter *Ex parte the Copyhold Commissioners, &c.* as will raise the costs of the Copyhold Commissioners and the Church Estates Commissioners, when taxed be sold. And it is ordered, that out of the money to arise by such sale the said costs be paid.

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THE BISHOP
OF LONDON.

1860.

May 24, 25.
Before The
LORDS JUS-
TICES.

Before the
passing of the
Joint Stock
Companies
Act, 1856, a
company was
registered with
unlimited
liability. It
was afterwards
registered
under the act
with limited
liability.

Held that the
Court of Chan-
cery had no
jurisdiction to
wind up the
affairs of the
company.

The restric-
tion as to the
time of appeal-
ing under the
Winding-up
Act of 1848
does not apply
to an appeal
from an order
on the ground
of want of
jurisdiction to
make it.

The Court
of Bankruptcy
has no juris-
diction to re-
hear a petition
so as to extend
the time for
appealing.

In the Matter of the PLUMSTEAD, WOOLWICH and CHARLTON CONSUMERS PURE WATER COMPANY, and the PLUMSTEAD, WOOLWICH and CHARLTON CONSUMERS PURE WATER COMPANY, LIMITED; and

In the Matter of the JOINT STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849, and of the JOINT STOCK COMPANIES ACT, 1856; and

The OFFICIAL MANAGER OF THE ABOVE-NAMED COMPANY *v.* DAVIS.

THIS was a motion on behalf of certain contributories to the above company, on the petition of whom, with another petitioner since deceased, an order had been made on the 19th of November, 1858, by Vice-Chancellor *Kindersley*, directing that the company should be wound up. The present application was, that that order might be altogether discharged, or that special directions might be given to confine the winding up of the company under the order to the transactions which occurred and the liabilities which accrued prior to the 5th of November, 1856, the date of the registration of the company as a company of limited liability, or that such order might be otherwise varied and such other order might be made on the petition as their Lordships should think fit, and that all further proceedings under the order might be stayed, or that such order might be made with reference to the proceedings already had and to be had under the order as to the Court should seem meet.

With this motion there came on to be heard by order an appeal from a decision of the Master of the Rolls in the above suit, and an appeal from an order of the Court of Bankruptcy in the above matter.

The

The following is a short statement of the facts.

In the month of *May*, 1852, the Defendant *Lewis Davis*, who was a brewer and brickmaker at *Plumstead*, and was seised of a freehold estate there, in which he had discovered a spring whence a supply of water could be obtained, caused a meeting of persons residing in the neighbourhood to be held, with a view to the formation of a new water company, and ultimately, in *October*, 1852, an association was formed for the purpose of supplying the towns and parishes of *Plumstead*, *Woolwich* and *Charlton*, and the inhabitants of those parishes respectively, with pure water, and for other purposes, under the name or style of the *Plumstead, Woolwich and Charlton Consumers Pure Water Company* under the 7 & 8 Vict. c. 110, subject to the provisions of that act and of a deed of settlement dated the 1st of *October*, 1852, and made between the several persons whose names were thereunto subscribed of the first part, the Defendants *Charles Starmer* and *Richard Henry King* of the second part, and *Robert Thomas Barry* of the third part. By this deed it was, amongst other things, agreed that the Defendants *Charles Starmer* and *Richard Henry King* and *Robert Thomas Barry* should be and they were thereby appointed the trustees of the company, with power in the name and on behalf of the company to make, do and execute, or to rescind, vary, alter or abandon all such conveyances, transfers, contracts for sale or other acts, deeds, matters and things whatsoever in relation to the lands, hereditaments, stocks, funds, securities and estates vested or to be vested in them, with power from time to time to institute, conduct, compromise, and terminate all such proceedings at law or in equity in relation thereto as the directors should think proper.

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 PLUMSTEAD,
 &c.,
 WATER Co.

The

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In re
BLOMSTEAD,
&c.,
WATER CO.

The company was completely registered on the 14th of October, 1852.

On the 5th of November, 1856, the company registered itself as a company with limited liability under the Joint Stock Companies Act, 1856 (a), and changed its name by adding thereto the word "limited."

The

(a) The following were the sections of the 19 & 20 Vict. c. 47, referred to in the arguments and judgments.

Sect. 5. "The memorandum of association shall contain the following things, (that is to say,) 1. The name of the proposed company. 2. The part of the United Kingdom, whether *England, Scotland or Ireland*, in which the registered office of the company is to be established. 3. The objects for which the proposed company is to be established. 4. The liability of the shareholders, whether it is to be limited or unlimited. 5. The amount of the nominal capital of the proposed company. 6. The number of shares into which such capital is to be divided, and the amount of each share, subject to the following restriction:—that in the case of a company formed with limited liability, and hereinafter called a limited company, the word 'limited' shall be the last word in the name of the company."

Sect. 59. "The provisions of this act relating to the winding up of companies shall apply to all companies registered under this act, and to all companies registered under the act passed in the eighth

year of the reign of her present Majesty, cap. 110, and intituled, 'An Act for the Registration, Incorporation and Regulation of Joint Stock Companies,' from and after the date at which they have obtained registration under this act, in manner hereinafter mentioned, but not any other companies."

Sect. 60. "The expression 'the Court,' as used in the third part of this act, shall mean the following authorities (that is to say); in the case of a company engaged in working any mine within and subject to the jurisdiction of the Stannaries, the Court of the Vice-Warden of the Stannaries: in the case of a limited company registered in England that is not engaged in working any such mine as aforesaid, the Court of Bankruptcy having jurisdiction in the place in which the registered office of the company is situated; in the case of a limited company registered in Ireland, whose registered nominal capital does not exceed 5,000*l.*, the Commissioners of Bankrupt in Ireland. In all cases not hereinbefore provided for 'the Court' shall mean as respects companies registered in England the High Court of Chancery of England; as respects com-

The order of the Vice-Chancellor under appeal was dated the 19th of November, 1858, and was intituled in

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panies registered in Scotland, the Court of Session in either division thereof; and as respects companies registered in Ireland, the Court of Chancery of Ireland. And any court to which jurisdiction is given by the third part of this act, not being the Court of Chancery or the Court of Session, shall, in addition to its ordinary powers, have the same power of enforcing any orders made by it in pursuance of this act, if in England, as the Court of Chancery has, if in Ireland as the Court of Chancery in Ireland has, in relation to matters within the jurisdiction of such Courts respectively."

Sect. 107. "There shall be repealed :—1. The act passed in the eighth year of the reign of her present Majesty, cap. 110. 2. An act passed in the eleventh year of the reign of her present Majesty, cap. 78, intituled 'An Act to amend an Act for the Registration, Incorporation and Regulation of Joint Stock Companies.' 3. 'The Limited Liability Act, 1856.' But such repeal shall not take effect with respect to any company completely registered under the said act of the eighth year of her present Majesty, until such company has obtained registration under this act as hereinafter mentioned."

Sect. 108. "The following acts (that is to say):—1. An act passed in the eleventh year of the reign of her present Majesty, cap. 45,

and intituled, 'An Act to amend the Acts for facilitating the Winding up of the Affairs of Joint Stock Companies unable to meet their Pecuniary Engagements, and also to facilitate the Dissolution and Winding up of Joint Stock Companies and other Partnerships.' 2. An act passed in the thirteenth year of the reign of her present Majesty, cap. 108, and intituled 'An Act to amend the Joint Stock Companies Winding-up Act, 1848.' 3. An act passed in the eighth year of the reign of her present Majesty, cap. 111, and intituled, 'An Act for facilitating the Winding up the Affairs of Joint Stock Companies unable to meet their Pecuniary Engagements.' 4. An act passed in the ninth year of the reign of her present Majesty, cap. 98, and intituled, 'An Act for facilitating the Winding up the Affairs of Joint Stock Companies in Ireland unable to meet their Pecuniary Engagements:' shall not apply to companies registered under the said act of the eighth year of the reign of her present Majesty, cap. 110, from and after the date at which they have obtained registration under this act as hereinafter mentioned.

Sect. 109. "No repeal hereby enacted shall affect:—1. Anything duly done under any acts hereby repealed before such repeal comes into operation. 2. Any right acquired or liability incurred under any such acts before such re-

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the matter of the Joint Stock Companies Winding-up Acts, 1848 and 1849, and also of the Joint Stock Companies Act, 1856, and of the *Plumstead, Woolwich and Charlton Consumers Pure Water Company*, and the *Plumstead, Woolwich and Charlton Consumers Pure Water Company, Limited*. It directed that the *Plumstead, Woolwich and Charlton Consumers Pure Water Company*, and the *Plumstead, Woolwich and Charlton Consumers Pure Water Company, Limited*, should be wound up under the provisions of the above acts.

Before this order was made, and in order to provide for the event of the Court of Chancery only making the order as to the company in its unlimited state, a petition was presented by the same Petitioners to the Court of Bankruptcy in the matter of the company by both its titles, praying that the company limited in respect of its

peal comes into operation. 3. Any penalty, forfeiture or other punishment incurred or to be incurred in respect of any offence against any such acts committed before such repeal comes into operation. 4. Any proceedings to be taken in the prosecution of any order for winding-up a company made before such repeal comes into operation."

The following enactment was also referred to :—

20 & 21 Vict. c. 14, s. 23.—“The 107th section of the principal act shall be repealed, and in lieu thereof be it enacted: That—1. An act passed in the eighth year of the reign of her present Majesty, cap. 110, and intituled, ‘An Act for the Registration, Incorporation and Regulation of Joint Stock Companies,’

and 2. An act passed in the eleventh year of the reign of her present Majesty, cap. 78, intituled ‘An Act to amend an Act for the Registration, Incorporation and Regulation of Joint Stock Companies;’ and 3. ‘The Limited Liability Act, 1855,’ shall be deemed to have been and still remain unrepealed as to any company completely registered which hasnot obtained registration under the principal act, until such time as such company obtains registration under the Joint Stock Companies Acts, 1856, 1857, but from and after such time, and not before, shall be repealed as to such last-mentioned company, and, subject as aforesaid, all the acts mentioned in this section shall be repealed.”

its transactions which occurred and liabilities which accrued since the registration of the company as a company of limited liability might be wound up under the provisions of the Act of 1856, or that such further or other order in the premises might be made as to the Court might seem fit.

After the order for winding up the company generally had been made as above mentioned by the Vice-Chancellor, the petition to the Court of Bankruptcy came on to be heard, and was adjourned till the 15th of *December*, 1858, when on the Petitioners asking that it might be dismissed, and no person appearing to oppose such application, an order to that effect was made by Mr. Commissioner *Goulburn*.

Robert Palmer Harding was by an order of the Vice-Chancellor, dated the 2nd of *December*, 1858, appointed official manager of the company; and on the 3rd of *February*, 1860, he filed his bill in the above suit by his title of official manager of the company against the Defendant *Davis* and the trustees of the company, charging that the terms upon which the directors or trustees in the name of the company took the land from the Defendant *Lewis Davis* and the terms of the lease were improvident and injurious to the company and oppressive, and that the contract generally concerning the land of the Defendant *Lewis Davis* was not such as ought to have been entered into on behalf of the company, nor such as would have been approved of by the general body of shareholders of the company if it had been submitted to them as by law it ought to have been, and praying that it might be declared that under the statute 7 & 8 Vict. c. 110 the terms of the lease had not come into force as against the company or the shareholders thereof or the Plaintiff, and that the Plaintiff
might

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might be declared to be entitled to the benefit of the works and improvements constructed and made by the company upon the land of the Defendant to the extent of the money expended in and about such works and improvements, or just compensation for the same; that the money so expended or that such compensation might be declared to be a charge upon the land and the works and improvements and the fee simple thereof, and that such charge or so much thereof as might not be satisfied out of the rents and profits of the said premises might be satisfied by a sale of the premises or otherwise as to the Court might seem meet; and that the Defendant *Lewis Davis* might be restrained from carrying on, continuing or taking any further proceeding in an action of ejectment which he had brought against the company, and from commencing or prosecuting any other action or proceeding for recovering possession of the said land and works or any of them.

The case came on before the Master of the Rolls on the 14th of *February*, 1860, and on the 12th of *March*, 1860, his Honor dismissed the bill on the ground that the winding-up order was a nullity by reason of the Court of Chancery having no jurisdiction to make it. The case is reported in the 28th volume of Mr. *Beavan's Reports* (*a*).

On the 13th of *March*, 1860, a shareholder in the company, named *Chapman*, filed a petition in the Court of Bankruptcy praying that the company might be wound up in that Court; another shareholder, named *Taylor*, afterwards filed a similar petition.

On the 14th of *March* a motion was made in the
Court

(a) *Page 545.*

Court of Bankruptcy on behalf of the survivors of the original petitioners in chancery and bankruptcy, before Mr. Commissioner *Holroyd* to rehear the original petition in bankruptcy which had been dismissed as above mentioned, whereupon, and on an affidavit of one of the solicitors to the surviving petitioners, it was ordered that the order of dismissal made by Mr. Commissioner *Goulburn* should be discharged, and it was ordered that the 26th of *March* should be appointed for the further hearing or the rehearing of the original petition in bankruptcy, and that advertisements to that effect should be published, similar to those required in the case of an original petition for winding up a company.

On the 26th of *March*, 1860, the petition came on accordingly to be reheard before Mr. Commissioner *Goulburn*, who thereupon made the following order:— “It appearing to this Court that an order for winding up the said Company, both in its limited and unlimited character, was made by his Honor the Vice-Chancellor Sir *Richard Torin Kindersley*, on the 19th day of *November*, 1858, and it further appearing that the said order of the said Vice-Chancellor is still subsisting and undischarged; this Court doth order that the said petition be, and the same is, hereby discharged.” The appeal in bankruptcy was that of the survivors of the original petitioners, seeking to have Mr. Commissioner *Goulburn's* order reversed or altered, and to have an order made for winding up the company in bankruptcy, as sought by the original petition in the Court of Bankruptcy.

Mr. *Roundell Palmer*, Mr. *W. D. Lewis* and Mr. *H. R. Bagshawe* for the Official Manager the Plaintiff in the suit, in support of the appeal from the Rolls' order.

The winding-up order made by the Vice-Chancellor and the appointment of the Plaintiff as Official Manager
not

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not having been appealed from are conclusive, and are at all events so upon the Appellant *Davis*, who withdrew his opposition to the petition before the Vice-Chancellor under an arrangement as to the payment of his costs. On the true construction of the Act of 1856, the company not being exclusively a limited company, but being only limited as regarded its dealings since the last registration, was not within the 59th or 108th section of the Act of 1856, but remained within the Acts of 1848 and 1849. But if the Court should not think that the whole of the transactions were within the jurisdiction of the Court, those before the registration must be so as the act cannot operate retrospectively; *Lofthouse's Case* (a); and the company must therefore be regarded as having had two existences, one as an unlimited company, and the other as a limited company. As to its former state the jurisdiction of this Court remained, and the winding-up order is good at all events to that extent. The 5th section of the act defines what is meant in the act by the expression "a limited company," for it says, "In the case of a company formed with limited liability, and herein-after called a 'limited company.'" A company which was originally formed with unlimited liability is not, therefore, what is meant.

*Mr. Selwyn* and *Mr. Jessel* for the Defendant *Davis*.

By the Act of 1856, the Court of Chancery was deprived of the jurisdiction to make an order for winding up a limited company; and by the last registration this company became exclusively one of that description. Nor is there any foundation for the argument that the former unlimited company remained in existence for any purpose whatever. There was and is only one company, and that is a limited company. The order of the Vice-Chancellor

(a) 2 *De G. & J.* 69.

Chancellor was therefore a nullity, and the Plaintiff had no title to sue. The decree is not sufficiently favourable to Mr. *Davis*. It ought to have given him his costs, and he, as Respondent, is entitled to have it varied in his favour in that respect.

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They also referred to 20 & 21 Vict. c 14, s. 23 (a).

Mr. *Lloyd* for one of the trustees asked for the costs of that trustee in the suit.

Mr. *Glasse* and Mr. *Cottrell*, in support of the motion on behalf of the surviving petitioners for the winding-up order to discharge that order or to modify it.

A modification of the order is the correct course to be taken, leaving it in force so far as regards the dealings of the company while it was unlimited. The Court of Bankruptcy had no jurisdiction to deal with the rights of the parties arising out of the transactions of the company while it was unlimited, and unless the Court of Chancery has jurisdiction to deal with those rights, there is no remedy in respect of them under any of the acts. But if the order cannot be so modified, then it ought to be discharged, so that an Official Manager may be effectually appointed.

Mr. *Jessel* for Mr. *Davis*, one of the Respondents.

Although the order was erroneous the time has gone by for appealing against it, the period limited by the 33rd section of the Act of 1849 for appealing from an order of the Vice-Chancellor being three weeks, and no relaxation of this statutory restriction being possible ; *Sanderson's Case* (b) ; *Ex parte Clarke* (c).

Mr.

(a) *See ante*, p. 24, n.(c) 2 *De G. & J.* 245.(b) 3 *De G. & Sm.* 66.

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**Mr. J. H. Palmer** appeared for shareholders in the company.

**Mr. De Gex** for other shareholders and for one of the trustees under the company's deed.

He contended that the winding-up order ought to be discharged, and that the restriction as to the time for appealing did not apply where the Court had made an order not within its jurisdiction. He asked for the costs of the trustee in the suit.

**Mr. Bacon**, **Mr. G. M. Giffard** and **Mr. Hannen** for other parties.

**Mr. Baily** and **Mr. Doria**, in support of the appeal from the order of Mr. Commissioner *Goulburn*.

The application to Mr. Commissioner *Holroyd* to appoint a day for rehearing and to rehear the original petition was an original application, and there is no appeal from Mr. *Holroyd's* order. It is the order of Mr. Commissioner *Goulburn* which is the subject of appeal. Mr. *Holroyd's* order was correct, for the limitation as to time does not apply to a rehearing.

They referred to *Ex parte Roffey* (*a*); *Ex parte Baker* (*b*); *Ex parte Baines* (*c*); *Ex parte Hensor* (*d*); *Ex parte (irrenewed)* (*e*).

**Mr. Rawbrough** for **Mr. Chapman**.

The authorities cited were under the old law before the limitation of time was introduced. This cannot be evaded by a rehearing; *Sanderson's Case* (*f*); *Ex parte Carter*

(*a*) 9 New, 913.

(*d*) *Buck*, 427.

(*b*) *Munt. J. M.L.* 272.

(*e*) 1 *Mont. & Ayr.* 65.

(*c*) 1 *St. J. 834.*

(*f*) 3 *De G. & Sm.* 66.

*Carter (a); Ex parte Clarke (b); 12 & 13 Vict. c. 106,*  
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Mr. *Lewis* in reply in the suit.

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Mr. *Glasse* in reply on the motion.

Mr. *Baily* in reply on the petition in bankruptcy.

*The LORD JUSTICE KNIGHT BRUCE.*

We must in the first place deal with the appeal from the dismissal of the bill by the Master of the Rolls. Having regard to the arguments on which his Honor proceeded in dismissing the bill, we are to state whether in our opinion the orders of the Vice-Chancellor *Kindersley* of the 14th of *November*, 1858, and the 2nd of *December*, 1858, or either of them, were or was made without jurisdiction, not whether having jurisdiction the Vice-Chancellor correctly exercised it. The latter question probably, at this distance of time, we should scarcely be at liberty to enter into, even if we were disposed to do so. The Master of the Rolls was of opinion that the orders of the Vice-Chancellor were made upon the supposition of the continuance of a jurisdiction which had in fact then ceased to exist, and that he was bound to treat those orders as of no validity, and as not existing. The Master of the Rolls appears to have been relieved from the difficulty of differing from the Vice-Chancellor, by the consideration that the Vice-Chancellor seems to have been informed, on the occasion of the application for the order of *November*, 1858, that a decision had been made or an opinion had been expressed by the Court of Appeal in some way upon the effect of the acts

(a) 1 *De G., M. & G.* 212; (b) 2 *De G. & J.* 245.  
4 *H. of L. Cas.* 337.

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acts of parliament with reference to the point now in question. My own belief is, that the Court of Appeal never did decide or express any opinion upon the question involved in this petition. The Vice-Chancellor seems however to have considered that the Court of Appeal had decided the point.

We are to decide, upon the construction of the several acts of parliament together, what was after a certain time specified in the Act of 1856, to be the proper Court for winding up this company. I am of opinion that the intention to be properly collected, from the whole of the act taken together, is that which the Master of the Rolls has collected; and I am afraid that we are bound, however unwillingly, to treat the orders of the 14th November, 1858, and the 2nd of December, 1858, as not made, for they were made, I think, in the supposed exercise of a jurisdiction that did not exist. I think that the Plaintiff in the suit at the Rolls had no title, and that by no course or proceeding could his alleged title be maintained so as to sustain the suit.

I think, therefore, that the order of dismissal must stand, but I entirely agree in the course which the Master of the Rolls took with regard to the costs so far as Mr. Davis is concerned, because there can be no doubt that Mr. Davis, although he did not consent and did not preclude himself from raising the objection, did in a sense acquiesce; and taking the objection as he did, and treating the suit as he did, although I do not forget that he suggested the objection by his answer, I think that he was not entitled to any costs of the suit at the Rolls, and that he is not entitled to any costs of the appeal. The doubt which I have had with regard to the costs at the Rolls, and of the appeal from the Rolls, has

has been with reference to the costs of the other Defendants Admiral *King* and Captain *Harmar*.

Then comes the consideration of the motion supported by Mr. *Glasse*, which is of course not in the Rolls cause but in the matter, and it must follow, if the view that as I have said I take of the true construction of the acts is correct, that the orders must be discharged. It is true that a considerable time—much more than three weeks, and much more than three months—has elapsed; but we discharge these proceedings, not upon any difference of opinion between us and the Vice-Chancellor in the exercise of discretion, but on the ground that they have been made without jurisdiction, and ought to be deemed to have had from the beginning no effectual existence.

With regard to the petition in bankruptcy, I am afraid that there the objection of time does apply, and that those who complain of what has taken place in bankruptcy have come too late. Although we dismiss the petition in bankruptcy, I think that we should do so without prejudice to any proceedings that may be taken before the learned Commissioner, either on the petition of Mr. *Chapman*, or on the petition of Mr. *Taylor*, or of any other person.

*The LORD JUSTICE TURNER.*

This case comes before us on three applications: first, an application to discharge the order of the Vice-Chancellor Sir *R. T. Kindersley* for winding up the company; secondly, an appeal from a decree of the Master of the Rolls, by which his Honor dismissed the bill filed by the Official Manager of the company ap-

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pointed under the order of the Vice-Chancellor; and thirdly, a petition in bankruptcy presented by shareholders in the company for the purpose of winding it up.

What is right to be done on the two first of these applications seems to me to depend mainly, if not wholly, on the construction of the act of parliament of 1856; as to the petition in bankruptcy, there may be distinct considerations, but the other cases depend, as I think, mainly, if not wholly, upon the construction of the above-mentioned act, as to which the question is, whether it has taken away the jurisdiction of the Court of Chancery as to a company originally founded with unlimited liability, but registered under that act with limited liability.

The construction of this act is open to considerable question, but I am satisfied that the intention of the legislature was to place within the jurisdiction of the Court of Bankruptcy all companies originally unlimited which were registered under the act as limited companies, and to take away all jurisdiction over such companies under the acts which had been previously passed for the purpose of winding up companies. There was a statutable jurisdiction created by the original winding-up acts, and I think that the true meaning of this act of parliament was to take away that statutable jurisdiction in the particular cases to which I have referred.

It is said that, on the true construction of this act, there were here two companies, one a company with limited liability, and the other a company with unlimited liability, but I think it impossible to maintain that argument, for when we look at the 107th section of the act; we find first of all a repeal of the statutes 7 & 8 Vict.

c. 110,

c. 110, and 10 & 11 *Vict.* c. 78, with a proviso that such repeal shall not take place with respect to any company completely registered under the 7 & 8 *Vict.* c. 110, until such company had obtained registration under the new act, so that a company incorporated under the 7 & 8 *Vict.* c. 110, (which would be a company up to that time incorporated with unlimited liability,) is called "such company" though it obtains registration under that act. Again, in the 108th section of the act there is a repeal of the winding-up acts, so far as relates to these companies. The section says that the following acts (that is to say, the former winding-up acts) shall not apply to companies registered under this act, nor to companies registered under the act of the 7 & 8 *Vict.* c. 110, from and after the date at which they have obtained registration under this act; so that the jurisdiction under the former winding-up acts is taken away as to companies created under the 7 & 8 *Vict.* c. 110, when these companies become registered under this act, whether registered with limited or with unlimited liability.

Other provisions of the act lead to the same conclusion. By the 59th section, it is enacted that the provisions of the act relating to the winding up of companies shall apply to all companies registered under the act, and to all companies registered under the act of the 7 & 8 *Vict.* c. 110, from and after the date at which they have obtained registration under the act of 1856 in manner mentioned in the act, but not to any other companies; and by the jurisdiction clause (a), in the case of a limited company registered in *England* that is not engaged in working any such mine as is comprised within the exceptions specified in the act, the Court of Bankruptcy having

(a) *Sect. 60; see ante, p. 22, note.*

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having jurisdiction in the place in which the registered office of the company is situate is the Court which is to have the power under this act.

Now can it be said that the company is not a limited company registered in *England*, when by the operation of being registered it has been brought within the provisions of this act by the 59th section? The best argument for the Official Manager was brought forward last, namely, that which was founded on the 5th section, and which went to show that that section was intended to define a limited company. The section says, "that in case of a company formed with limited liability, and hereinafter called a limited company, the word 'limited' shall be the last word in the name of the company." But this goes no further than to show that companies formed with limited liability were to be included in the description of limited companies. It does not show that other companies were not to be included in the term, and, therefore, cannot be taken as a controlling definition that no company should be taken to be a limited company within the meaning of the act unless it was formed with limited liability. I should be very slow in acting upon any such conclusion as is attempted to be deduced from that section, as against the general words of the act, and as against the extended construction which the act appears to bear in its different parts.

On the whole policy and purport of the act, the conclusion at which I have arrived (a conclusion fortified by the 23rd section of the act of 1857), is that the statutable jurisdiction originally created for the purpose of winding up these companies is taken away from the Court of Chancery (to which it had been given), and is now transferred to the Court of Bankruptcy.

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Some misunderstanding seems to have existed as to a case decided in the matter of the *Welsh Potosi Mining Company*, but I am satisfied that it was never intended to decide anything in that case which can at all affect the present question. The point there was that a shareholder had actually retired before the passing of the act which authorized limited liability, and it was held that the act could not be so construed as to make persons liable who were not under any liability at the time of the passing of it.

I think that the only mode of dealing with the motion supported by Mr. *Glasse*, is to discharge the order for the winding up of the company in Chancery. The result of that will be, that the Plaintiff in the suit at the Rolls, being the Official Manager appointed under that order, which was merely null and void, there having been no jurisdiction to appoint him, can have no title to maintain the suit. Glad as we should have been to save expense in this case, certainly we should not be justified in substituting as a Plaintiff on the record a person who may have a good title, in order to support a bill filed by a Plaintiff who had no title at all. That is a length to which the Court cannot be asked to go.

As to the petition in bankruptcy, it appears to me that the application to rehear the original petition is altogether out of time; all that can be done, therefore, will be to dismiss that petition. The dismissal of it will not prevent any one, upon the new state of circumstances which will now arise in consequence of the jurisdiction of the Court of Chancery being removed altogether, from making any application which he may be advised to the Court of Bankruptcy to wind up under the powers given to that Court.

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The order, therefore, will be to discharge the order for the winding up made in Chancery; to affirm the decision at the Rolls subject to the question of costs, to which my learned Brother has referred, and to dismiss the petition presented in bankruptcy.

The reserved question as to costs was then discussed, and their Lordships ultimately gave no costs to any of the parties.



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May 25, 26.

*Before The
Lord
Chancellor
Lord
CAMPBELL.*

In 1841 a client, before going abroad, gave a power of attorney to his solicitor in *England* to manage the whole of the client's property and

concerns in *England* while he was abroad, and, generally, to do all other acts, deeds, matters or things whatsoever in or about the estates, property and affairs of the client, as amply as the client could do or have done.

In *March*, 1849, the attorney, professing to act under the power, borrowed 500*l.* upon deposit of a policy of assurance belonging to the client, and afterwards misappropriated the money: *Held*, that whether the power of attorney per se authorized the raising of the money upon the security of the policy or not, yet, when coupled with a correspondence between the attorney and client showing that the latter, believing the power to have that effect, desired it to be so exercised when occasion should require, it precluded the client from disputing the validity of the mortgage.

Extent of general words in powers of attorney.

The circumstance of only one solicitor acting in a transaction does not constitute him the solicitor of both parties, so as to affect one with notice of facts known to the other.

The omission to require strict legal evidence of title before advancing money is not necessarily such negligence as would be attended with the same consequences as actual notice.

Actual payment of money to an attorney under a power not requisite to enable him to give a discharge.

report of the hearing below in Mr. *Giffard's* Reports (*a*). The following statement will be sufficient for the purposes of this report.

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The Plaintiff *William Perry*, on being appointed consul at *Panama*, executed a power of attorney, dated the 12th November, 1841, whereby, after reciting that, being about to leave the *United Kingdom* and reside at *Panama*, he had requested *John Parkinson* to take upon himself the care of his estate and property, and to act for him in his affairs during his absence, which *Parkinson* had consented to do, he appointed *John Parkinson* his true and lawful attorney to conduct and manage all and every his affairs, matters and things within the *United Kingdom* during his, *Perry's*, absence, and for that purpose authorized and empowered *Parkinson* in the name and on the behalf of him, *Perry*, to ask, demand, sue for, recover and receive from all persons and bodies politic or corporate in the *United Kingdom* all sums of money, debts, dues, goods, wares, merchandizes, chattels, effects or things, of what nature or description whatsoever, which then or at any time during the subsistence of the power might become due or owing to him, *Perry*; to settle any account or reckonings, and receive balances; to receive all sums of money then due or which might become due on mortgages or other securities, and on receipt thereof to sign good discharges; to execute all sufficient re-conveyances, releases or other assurances of land held in mortgage; to sign certificates of bankrupts and releases of insolvents, and to compound for debts, and to receive compositions or dividends, and to give discharges for such debts, or submit to arbitration all other claims, rights, matters and things concerning him, *Perry*, as he, *Parkinson*, should think fit for the benefit of *Perry*, and to enter into arbitration bonds;

to

(*a*) *Vol. 2, p. 138.*

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to appear for *Perry* in all courts, before all magistrates, or officers at law or in equity whatsoever, as *Parkinson* should think fit; to sue, arrest, distrain upon, imprison, and out of prison liberate, release and discharge, all persons indebted or to become indebted to *Perry*. In the name of *Perry* to commence any action or suit, real as well as personal, in any court of law or equity; to recover any debt, sums of money, right, title, interest, property, matter or thing whatsoever due to *Perry*, by any means, and to prosecute or discontinue, or become nonsuit therein if *Parkinson* should see fit, and in any lawful way to recover debts; to appoint any solicitor or attorney at law or in equity; to sign and give any warrant or warrants, and to prosecute and defend in the premises in *Perry* or *Parkinson's* name; to enter upon all farms, lands, hereditaments and real estates of *Perry*, and to examine their condition, and forthwith to give proper notices for repairing the same, and to oversee and manage and improve them to the best advantage; to pay or allow all taxes, rates, charges, deductions, expenses and all other payments and outgoings due or to become due on account of such lands, and to contract with any person for leasing all or any of the said premises; to set fines for new leases, and to accept surrenders of leases, and for that purpose, in *Perry's* name, and as his act and deed, to make, seal, deliver and execute any lease or leases, demises or grants or other deeds necessary in that behalf; to receive and recover all rents and arrears of rents, services, issues, profits, emoluments and sums of money due or to become due; and to enter and distrain, and the distresses to retain and keep, or to sell and dispose of according to law; and for all or any of the purposes aforesaid to enter into and sign, seal and execute, and perfect, and, as the act and deed or acts and deeds of *Perry*, to deliver any contract or contracts, deed or deeds, surrender

surrender and assurance for conveying, either by way of absolute sale or in exchange, the said messuages, lands, tenements or hereditaments, or any part or parts thereof, in and about the premises aforesaid; and for the better doing, performing and executing all or any of the matters and things aforesaid, generally to do all and every or any other acts, deeds, matter or things whatsoever in or about the estates, property and affairs of him the said *W. Perry*, as amply and effectually to all intents and purposes as the said *W. Perry* could do or have done in his proper person if the power had not been executed ; he, the said *W. Perry*, thereby ratifying and confirming, and promising or agreeing, at all or any time or times, to allow, ratify and confirm, all and whatsoever *J. Parkinson* should lawfully do or cause to be done in and about the premises by virtue of the power.

Shortly after the execution of the power *Perry* left *England* for *Panama*, having previously deposited with *Parkinson* two policies of assurance on the life of the Rev. *J. D. Haslewood*, one in the *Hope Life Assurance Society* for the sum of 619*l.* 10*s.*, which was afterwards exchanged for a like policy in the *Imperial Assurance Company*, and the other in the *Law Life Assurance Society*. *Perry* was also entitled to certain leasehold houses and premises at *Kennington*, the rents of which, as well as his salary, *Parkinson* received for him under the power of attorney.

In 1849, *Parkinson*, as solicitor of the executors under some wills, received from them a sum of 650*l.*, being the amount of legacies bequeathed by those wills to Mrs. *Holl*, for the purpose of paying it to her ; and on Mrs. *Holl* and her husband going to him in *March*, 1849, to receive payment, he proposed to them to lend 500*l.*, part of the amount, to a client of his on security. On their assenting,

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assenting, he retained the 500*l.* out of the sum in his hands, and gave a cheque for 150*l.* for the balance to Mr. *Holl*, by whom it was afterwards received. *Parkinson* at the same time mentioned *Perry* as the client for whom the money was borrowed, and the deposit of the policy for 1,800*l.* as the security for repayment; and this policy was, some time afterwards, accordingly deposited with the *Holls*.

Perry, while at *Panama*, became desirous that *Parkinson* should negotiate a loan for him, and a correspondence ensued between them upon that subject, the material part of which was as follows:—

“ 11th October, 1848.—*Parkinson* to *Perry*.

“ I send you a copy of a letter from the *Law Life Assurance*, stating what the office will give for *Haslewood's* policy. Considering that the policy and bonus, amounting together to 3,356*l.*, will be paid on old *Haslewood's* death, and his age is 77, I think you ought not to make that sacrifice, but rather borrow money upon it, if you require any.”

“ May 15th, 1850.—*Perry* to *Parkinson*.

“ I beg of you, therefore, to raise 1,000*l.* for me, either on *Haslewood's* policy or on the houses at *Kensington*. I should think that, probably, the former would be the easiest method, but I leave it to you to do the best you can for me.

“ When you get the money, which I trust you will be able to do on the power of attorney you hold of mine, and, without loss of time, I would beg of you to pay it to my credit to Messrs. *Mocatta & Goldsmid*, who will send it out in francs, by which I gain considerably.”

“ 5th September, 1850.—*Perry* to *Parkinson*.

“ I hope soon to hear that you have been enabled to raise

raise some money for me, either on the houses or on *Haslewood's* policy."

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"18th September, 1850.—*Perry* to *Parkinson*.

"If you can send me 1,500*l.*, or 2,000*l.*, I shall be able to retire from this place two years hence, after selling the same house for 6,000*l.* or 7,000*l.* I hope you have been able to sell the houses in *Kensington*, and raise 1,000*l.* on *Haslewood's* policy of insurance. Do not sell it however; but you have power and authority to raise money."

"19th November, 1850.—Same to Same.

"I am surprised at not hearing that you have negotiated the loan for me. If your friend in *Scotland* does not agree to advance the money on *Haslewood's* security, take the trouble to see the directors of the *Law Life*."

That he might be in a situation to raise the money required by *Perry*, *Parkinson* induced Mr. and Mrs. *Holl* to return to him the policy for 1,800*l.*, and to take for their security in lieu of it a deposit of the policy for 619*l.* 10*s.*, giving them at the same time an instrument, dated the 6th *June*, 1851, and signed "William *Perry*—his attorney *Parkinson*," which purported to be an agreement to deposit with *Holl* and his wife the policy for 619*l.* 10*s.*, as a security for the 500*l.*, with a covenant that *Perry* would, if required, execute a proper deed of assignment. By this and other means *Parkinson* succeeded in raising and sending out the funds required by *Perry*.

In 1857, *Parkinson*, who had all along paid to Mr. and Mrs. *Holl* the interest upon the 500*l.*, became insolvent, and by deed dated the 22nd *June*, 1857, assigned all his property for the benefit of his creditors.

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In *September*, 1857, Mr. *Haslewood* died, and shortly afterwards the *Holls* gave notice of their claim as equitable mortgagees upon the proceeds of the policy for 619*l.* 10*s.*, and those proceeds were, soon after the institution of the present suit, paid by the office into Court.

*Perry*, on being informed of the claim of the *Holls*, filed the bill in this suit against the *Holls* and *Parkinson*, stating that he had never authorized the deposit by way of mortgage of the policy for 619*l.* 10*s.*; and praying that it might be declared that the Plaintiff was not liable to the payment of the sum of 500*l.*, or any interest in respect thereof, purported to be secured by the agreement of the 6th *June*, 1851, and that the same agreement might be declared to be void against the Plaintiff, and might be ordered to be cancelled or delivered up to the Plaintiff, and that the sum standing in Court and representing the proceeds of the policy might be paid to the Plaintiff.

Mr. *Craig* and Mr. *Schomberg* for the Plaintiff, in support of the appeal.

The Defendant *Parkinson* had no power to borrow upon the policy for 619*l.* 10*s.*, either under the power standing alone, or when coupled with the correspondence between the Plaintiff and him. The words of the power give the most ample authority to *Parkinson* to manage the Plaintiff's affairs; but give no power to borrow money. If he had such authority it must have been by implication from the terms of the power. But powers of attorney, however large in their terms, only give the authorities necessary to carry the special purposes of the instrument into effect; *Attwood v. Munnings* (*a*); *Burmester v. Norris* (*b*). Amongst the authorities specially conferred

(*a*) 7 *B. & C.* 278.

(*b*) 6 *Exch.* 796.

conferred by the power of attorney is one to repair the property and to manage the real estate. From this, perhaps, a power might be implied to borrow for repairs; but there is nothing to justify borrowing generally upon the security of the policy. The authority given by the power of attorney is not extended by the correspondence. There is no letter in the correspondence which authorizes borrowing on the policy for 619*l.* 10*s.*, and no letter prior to the transaction with the *Holls* which authorizes borrowing upon either of the policies. At the time of the transaction, therefore, there was clearly no authority given to borrow money generally, and whatever was written afterwards by *Perry* must be considered as written in ignorance of what *Parkinson* had done, and cannot be made the foundation of an implication, as against *Perry*, of an authority given by him to borrow upon the policy. Upon the assumption, however, that *Parkinson* had authority to borrow, still we submit that there has been here no payment to or to the use of *Perry* of the 500*l.* in question. *Parkinson*, being at the time of the transaction of *March, 1849*, a debtor to the *Holls* for 650*l.*, was allowed by them to retain the 500*l.* purported to be advanced to *Perry* by way of set-off against his debt. Such a transaction cannot be treated as a payment to *Perry*; *Todd v. Reid* (*a*); *Russell v. Bangley* (*b*); *Young v. White* (*c*); *Scott v. Irving* (*d*). Thirdly, we contend that the *Holls* are affected with constructive notice of the fraud. *Parkinson* prepared the memorandum of deposit and otherwise acted for them as their solicitor in the transaction as well as for *Perry*, and notice to him was notice to them; *Le Neve v. Le Neve* (*e*); *Kennedy v. Green* (*f*). Even if he was not their

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(*a*) 4 *B. & Ald.* 210.

(*d*) 1 *Barn. & Adol.* 605.

(*b*) 4 *B. & Ald.* 395.

(*e*) 3 *Atk.* 646.

(*c*) 7 *Beav.* 506.

(*f*) 3 *Myl. & K.* 699.

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their solicitor, still the circumstance that the policy was not at once forthcoming, and was not sent to them till some months after the money was retained, ought to have aroused suspicion and have put them upon inquiry. On the ground therefore of gross negligence, the Court will refuse, it is submitted, to aid them against the Plaintiff, who has never received the money, and in whose account current with *Parkinson* the advance of the 500*l.* is not mentioned.

Mr. *Malins* and Mr. *Lewin* for the Defendants Mr. and Mrs. *Holl*.

The power of attorney given to *Parkinson* extends to the borrowing of money generally. It gives a power generally to improve the property, and how is that to be done without raising money? There are two sets of general words in the power—the first set includes every description of management—the last are the ordinary general words. On the whole instrument every power is given to *Parkinson* which *Perry* himself could have exercised had he been in *England*. That view is further confirmed by the correspondence. The letters all repeat the direction contained in that of *May* 15th, 1850, to borrow money, and on *Haslewood's* policy. No distinction is made in the letters between the two policies, but both are alluded to. But supposing even the mortgage not to have been valid in *March*, 1849, still it was set up by what took place in *June*, 1851, when the policy in the *Law Life Office* was given up to *Parkinson* by the *Holls* on condition of his leaving with them the policy in the *Imperial Office*. At that time *Parkinson* had clearly authority to mortgage the former policy, and therefore he must be taken to have done so. The authorities cited as to set-off have not any bearing upon the mode in which the money was paid in the present case. *Parkinson,*

*kinson*, when he gave the cheque for 150*l.* to the *Holls*, had the whole 650*l.* due to them standing at his bankers, and the transaction was the same in effect as if he had actually paid the whole fund to the *Holls*, and they had then returned to him the 500*l.* as an advance to *Perry*. In borrowing the money *Parkinson* was acting intra vires, and therefore properly received the money as agent for *Perry*. With his subsequent employment of the money the *Holls* had nothing to do. There were no circumstances calculated to raise suspicion as to the transaction. The power of attorney, on the face of it, showed a power of borrowing; and so would the letters have done if they had been produced.

Mr. *Hetherington* for the Defendant *Parkinson*.

Mr. *Craig* in reply.

The power, though it extends to the improvement and even to the sale of the property, does not necessarily extend to mortgaging; *Stroughill v. Anstey* (a). The correspondence does not extend the scope of the power, but is merely evidence to show that *Perry* erroneously thought that he had given power to borrow. The utmost effect to be attributed to the power and the correspondence is that they conferred an authority to borrow if money was required for the purposes of the power. That it was so required the Defendants have failed to show.

The LORD CHANCELLOR.

Having heard this case very ably and fully argued on both sides, and being, I trust, in complete possession of all the facts and arguments that can be adduced, I have come

(a) 1 *D. G., M. & G.* 635.

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come to the conclusion that the decree of the Vice-Chancellor ought to be affirmed.

Mr. *Craig* has put three points distinctly and powerfully, and has made the most of them; but I think that he has failed in all three.

With regard to the first, it seems to me that, looking to the power of attorney and the correspondence, I ought to come to the conclusion that Mr. *Perry* intended to give to Mr. *Parkinson* the power to borrow money on this security; that he believed he had done so; and that he wished Mr. *Parkinson* (when the occasion occurred) to borrow money upon the security. There is not the slightest imputation on Mr. *Perry's* conduct in the affair. He has been deceived and defrauded, his confidence has been misplaced and abused; but I think that, after executing the power of attorney and after the correspondence which is in evidence, he is not entitled to come to a Court of Equity and say, "that which has been done according to my wishes and intentions was done without my authority," especially after the authority which he says he has given, or which, at all events, he may be presumed to have given. It seems to me not at all equitable that he should be allowed, under these circumstances, to assert effectually that this disposition of the policy of insurance was fraudulently obtained and void as against him.

When I look to the power of attorney, it is one of the most peculiar nature. I fully agree with the cases cited by Mr. *Craig* to show that, if there is a power of attorney to do a particular act followed by general words, these general words are not to be extended beyond what is necessary for doing that particular act for which the power of attorney is given. But this is a power of attorney

attorney given to manage the whole of the property and concerns of Mr. *Perry* in *England* while Mr. *Perry* was at *Panama*. The whole of his concerns of every description are to be managed by Mr. *Parkinson*, and he is to do generally in *England* whatever Mr. *Perry* himself might do if he were in this country instead of being on the other side of the *Atlantic*; these words following the power to sell the real estate and to control the whole of the property, "and generally to do all and every of any other acts, deeds, matters and things whatsoever in or about the estates, property and affairs of him the said *William Perry* as amply and effectually to all intents and purposes as he the said *William Perry* could do or have done in his own proper person if these presents had not been made, he the said *William Perry* hereby ratifying and confirming, and promising and agreeing at all or any time or times to allow, ratify and confirm, all and whatsoever the said *John Parkinson* shall lawfully do or cause to be done in and about the premises aforesaid by virtue hereof." Therefore all that *Parkinson* might do respecting the disposal and management of the property was to be ratified and confirmed; and it might, in one sense of the word, be a promise to ratify his act in raising money upon this policy.

But I do not mean to rest my judgment upon the ground that this power of attorney per se would have authorized the raising of the money upon the security of the policy. When I look to the correspondence, it seems to me, not indeed to be evidence of a fresh power having been given to Mr. *Parkinson* to raise money on the policy after this transaction of *March*, 1849, but to show, and I think to show conclusively, that, before *March*, 1849, Mr. *Perry* thoroughly believed that Mr. *Parkinson* had authority to raise money on that policy, and wished him to do so when the occasion should arise.

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I will refer to a few of the letters. There is a letter of the 11th *October*, 1848, before the transaction in question, which shows that, although Mr. *Parkinson* most improperly misapplied the money which he had raised, he bona fide thought that he had power to raise the money; and I believe that, when he represented to Mr. and Mrs. *Holl* that he had that power, it was not a fraudulent representation, but that he considered with the most perfect good faith that that power had been conferred upon him. He writes on the 11th of *October*, 1848, "on the other side I send you a copy of a letter from the *Law Life Assurance*, stating what the office will give for *Haslewood's* policy. Considering that the policy and bonuses, amounting together to 3,356*l.*, will be paid on old *Haslewood's* death, and his age is seventy-seven, I think you ought not to make that sacrifice, but rather borrow money upon it." Does that not clearly intimate that Mr. *Parkinson* considered himself as having authority, if it was expedient, to deal with this security; and that he gave prudent advice when he recommended Mr. *Perry* not to sell it to the *Law Life Company*, but rather to borrow money on it, if he required it? Mr. *Parkinson* asks for instructions, and gives this advice; but clearly intimates (as it seems to me) his belief that, as soon as it was deemed expedient for money to be borrowed on this security, it could be done without any other or fresh power of attorney being given. Now there is no letter put in evidence at all detracting from the inference to be drawn from this letter of *October*, 1848. We have no other evidence whatsoever in the correspondence of what was done until we come down to *May*, 1850. The subsequent letters certainly would not prove by themselves that there was any authority; and, although there might have been an authority in 1850, that would not show that there was an authority in 1849. But it seems to me that these letters are very strong to show that,

that, in the opinion of Mr. *Perry*, he had, before 1849, given Mr. *Parkinson* full power to deal with the policy. In a letter of the 15th *May*, 1850, he says, "I beg of you, therefore, to raise 1,000*l.* for me on *Haslewood's* policy, or on the houses at *Kennington*." How is he to do that? "When you get the money, which I trust you will be able to do on the power of attorney you hold of mine, and without loss of time, I would beg of you to pay it to my credit to Messrs. *Mocatta & Goldsmid*, who will send it out in francs, by which I gain considerably." Now here is an express declaration under his own hand, that he believed the power of attorney to be sufficient; that he had induced *Parkinson* to come to the same conclusion, and that both of them thoroughly believed that that power conferred the necessary authority on *Parkinson*. Again, on the 5th *September*, 1850, he writes, "I hope soon to hear that you have been enabled to raise some money for me, either on the houses or on *Haslewood's* policy,"—that is, not under any fresh power that I have conferred on you, but under the power you originally possessed. It is telling him that he has that power, and that *Perry* has given it. Again, on the 18th of *September*, 1850, "If you can send me 1,500*l.* or 2,000*l.*, I shall be able to retire from this place two years hence after selling the same house for 6,000*l.* or 7,000*l.* I hope you have been able to sell the houses in *Kennington* and raise 1,000*l.* on *Haslewood's* policy of insurance. Do not sell it however, but you have power and authority to raise money." And, if he had it then, it is quite clear that the intimation given to *Parkinson* by *Perry* was, that he had it originally when the power of attorney was executed. Then, on the 19th of *November*, 1850, he writes—"I am disappointed at not hearing that you have negotiated the loan for me. If your friend in *Scotland* does not agree to advance the money on *Haslewood's* security, take the trouble to see the directors of the *Law Life*."

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Life." That is a clear acknowledgment that it might have been borrowed from Mr. and Mrs. *Holl*. On the 12th of *March*, 1851, he writes—"I have written to *Erskine*" (that is his brother Sir *Erskine*) "about advancing me some money on *Haslewood's* security, and as you hold the documents it could be done at small cost." That is, you hold the policies, and all that you have to do therefore, holding the policies, is to act under the power of attorney.

Under all these circumstances, the Plaintiff having, in the course of this correspondence, intimated to *Parkinson* that *Parkinson* was authorized to borrow money for him upon the power of attorney, and *Parkinson* having exercised that power and done what both parties considered that he had authority to do, namely, to borrow money, although he afterwards misapplied it, I do not think the Plaintiff has any place to stand here and say that this was done without his authority.

Then, the next question is as to the payment of the money, and upon that really I have never felt the smallest doubt, because I entirely concur in the doctrine laid down with regard to set-off between an agent employed to receive money and the debtor. It is clear that set-off against the agent is not payment to the principal, who employs him to receive the money. But here we have a different transaction. *Parkinson* had the money, and there is every reason to suppose, that, if the *Holls* had declined the security, they would have had the whole 650*l.* There is, however, an offer made to them that it shall be lent to Mr. *Perry*. They accept that offer; the money would have been forthcoming and they would have had the whole; but, instead of taking it into their hands or pocketing 150*l.* and paying back to Mr. *Parkinson* the 500*l.*, they take a cheque for the difference. The 500*l.*

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is to remain as a loan from them to Mr. *Perry*, and that was a payment by the *Holls* to Mr. *Parkinson*; and, being a payment to Mr. *Parkinson*, it was a payment to Mr. *Perry*, who had given authority to Mr. *Parkinson*, under the power of attorney, to receive all money on his account.

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Then, as to the last ground on which the Plaintiff relies, I think he can hardly contend seriously that Mr. *Parkinson* ought to be considered as having been the attorney of Mr. and Mrs. *Holl*. Although they had no other attorney, it is clear that *Parkinson* was not their attorney. It does not follow, that if there is not an attorney on each side, the attorney who does act is the attorney of both. It is clear here that Mr. *Parkinson* was acting only for Mr. *Perry*, and that there is no ground for saying that he was employed as the solicitor of Mr. and Mrs. *Holl*; and to go on to say that, when *Parkinson* was ipse doli fabricator, and knew the iniquity which he contemplated, his knowledge of that should be the knowledge of the *Holls*—would really be almost exposing the doctrine of notice to ridicule.

But Mr. *Craig* relied more strenuously, and with better reason, on the ground of negligence, and if there had been gross negligence on the part of the *Holls*, so that, upon their suspicions being awakened, by reasonable inquiry they might have saved themselves from the fraud that was attempted to be practised, they would not be entitled to a decree in their favor. But I can see no negligence. Mr. *Craig* says—"Why did not they demand a sight of the power of attorney?" The answer is, that the affairs of life could not go on without reasonable confidence. If the *Holls* unreasonably gave confidence to *Parkinson*, of course they must suffer; but I think that they cannot be accused of having unreasonably

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reasonably trusted *Parkinson*, who told them, and told them truly, that he was the agent of this respectable gentleman at *Panama*; that he had charge of all his affairs; that Mr. *Perry* was his client, and wished to borrow the money; that he would pay £5 per cent., and that this was a favorable investment. I cannot see that Mr. and Mrs. *Holl* were at all to be blamed for giving credit to that representation which, so far, was true, although there was in contemplation an enormous fraud in misapplying the money. There was a regular deposit; there was the memorandum made, and from time to time the interest was regularly paid. I do not see, therefore, that there was any unreasonable confidence reposed by them in *Parkinson*; but there was confidence reposed in *Parkinson* by Mr. *Perry*; and I think that, although both parties are innocent, one is, generally speaking, not sorry to see that the loss has fallen on that innocent party who employed and authorized the fraudulent person, and thereby was remotely the cause of the fraud being committed.

For these reasons I think that the appeal must be dismissed with costs. As to *Kennedy v. Green* (a), I entirely assent to the law there laid down; but I think it in entire harmony with that case to say, that here there has not been such negligence on the part of Mr. and Mrs. *Holl* as ought to deprive them of the benefit of their security.

(a) 3 *Myl. & K.* 699.



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WHITE v. BAKER.

THIS was an appeal from a decision of the Master of the Rolls, on a special case.

Edward Prichard, the elder, by his will dated the 3rd of June, 1851, directed his executors to invest his personal estate, after payment of his debts, &c., upon the trusts therein expressed. The will then declared the trusts of a sum of 5,000*l.* in the following terms:—“As to the sum of 5,000*l.* sterling, or the stocks, funds, or securities, upon which the same shall be from time to time invested, upon trust to pay the dividends, interest and produce thereof unto my said wife for and during the term of her natural life, to and for her own absolute use and benefit, and from and after her decease upon trust to pay, transfer and assign the said trust sum of 5,000*l.*, or the stocks, funds, or securities upon which the same shall be invested, between my said son *Edward Prichard* and my said grandson *Arthur White* in equal shares and proportions, and in case of the death of either of them in the lifetime of my said wife, then upon trust to pay the whole of the said trust fund of 5,000*l.* and interest as aforesaid unto the survivor of them, the said *Edward Prichard* and *Arthur White*, his executors, administrators or assigns.”

The testator died soon after making his will; his son *Edward Prichard* died in 1856, leaving a will. The testator's widow and *Arthur White*, his grandson, were still alive. Upon the death of *Edward Prichard*, the question arose, whether *Arthur White*, the grandson, was entitled to a vested and indefeasible interest in the approved funds

*May 2, 26.**Before The
Lord
Chancellor
Lord
CAMPBELL
and The
Lords Jus-
tices.*

A testator bequeathed a legacy upon trust for his widow for life, and after her death upon trust for A. and B. in equal shares. “And in case of the death of either of them in the lifetime of my said wife, then upon trust to pay the whole of the said trust fund unto the survivor of them the said A. and B., his executors, administrators or assigns.”

A. died in the lifetime of the widow: Held, that upon his death B. acquired an indefeasible vested interest in the whole fund.

*Scurfield v.
Howes, 3 Bro.
C. C. 90,*

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funds representing the 5,000*l.*, subject to the life interest of the testator's widow.

A special case was accordingly filed which stated the above facts, and that *Arthur White* (the Plaintiff in the special case) had, with the concurrence of the widow, requested the testator's executors to sell the funds representing the 5,000*l.*, and out of the proceeds to purchase for the widow a life annuity of an amount equal to the income of those funds, and to pay the residue of the purchase-money to the Plaintiff. The questions asked were, first, whether the Plaintiff was entitled to a vested and indefeasible interest in the entirety of the funds, subject to the widow's life interest; and, secondly, whether the executors would be justified in carrying into execution the above proposal or arrangement for the sale of the funds.

The Master of the Rolls having answered these questions in the negative, *Arthur White* appealed.

Mr. *Peck*, for the Appellant.

The grandson claims an absolute title to the whole fund, subject to the life interest of the widow. [The LORD JUSTICE TURNER: Can we decide who is entitled to the fund in reversion? Does the act 13 & 14 Vict. c. 35, enable the Court to determine future rights?] The widow has agreed to concur with the Plaintiff in disposing of the fund and having a life annuity bought for her with part of the proceeds, leaving him to receive the rest; so that the question in fact is, whether the Plaintiff and the widow together can call upon the trustee for a transfer of the fund. [Their Lordships upon this stated their opinion to be, that they could determine the questions.] I contend, then, that the limitation over to the grandson took effect on the death of the son, and that

that there is nothing to divest his interest. "Survivor" properly means the longer liver of the two, and "either" is not opposed to "other," but to "survivor." *Scurfield v. Howes* (*a*) is almost identical with the present case, and is directly in the Appellant's favor. The words here are even more favourable to the Plaintiff, for the gift over there was simply to "the survivor," here to "the survivor of them the said *Edward Prichard* and *Arthur White*," which shows more distinctly that the qualification was the surviving the legatee, not the surviving the tenant for life. It is suggested, in Mr. *Jarmans* Treatise on Wills (*b*), that *Scurfield v. Howes* has been overruled; but the cases he refers to do not bear out this position, and in none of them was that case cited. In *Roper on Legacies* (*c*), it is treated as good law, and all the cases are considered reconcilable. *Antrobus v. Hodgson* (*d*) is in our favour. *Browne v. Lord Kenyon* (*e*) is distinguishable, for the language there used was sufficient to show that the death of the tenant for life was the period of survivorship referred to.

Mr. *Follett* and Mr. *T. Hughes*, for the executors of *Edward Prichard*.

The general rule established by the cases is, that survivorship is to be referred to the period of distribution, where distribution is postponed to a period subsequent to the death of the testator. If a fund is given to *A.* for life, remainder to "*B.* and *C.*, or the survivor of them," the authorities show that this means to "*B.* and *C.*, or such one of them as shall survive the tenant for life." The difference between this and a gift to *A.* for life, remainder to *B.* and *C.*, with a direction that in case

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(*a*) 3 *Bro. C. C.* 90.

(*d*) 16 *Simp.* 450.

(*b*) *Vol.* 1, p. 705, 2*nd* ed.

(*e*) 3 *Madd.* 410.

(*c*) *Vol.* 1, p. 585, *White's* ed.

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of the death of one of them, the whole fund shall go to the survivor, is merely verbal. "Survivor," therefore, is to be construed as meaning "one who survives the widow," and the result is, that if one dies in the lifetime of the widow and the other survives her, the survivor takes the whole fund; but if both die in the widow's lifetime, the original gift in moieties remains, the event on which the share of the one first dying was to be divested never having happened; *Harrison v. Foreman* (*a*). [*The LORD JUSTICE TURNER*: Has the rule in *Cripps v. Wolcott* (*b*) ever been applied to a case like the present, where there is no difficulty in referring the survivorship to the death of the legatee who first dies?] It is difficult to lay down any tangible distinction between that case and this (*c*). In *Scurfield v. Howes* (*d*), which is relied on by the Plaintiff, the present question was not mooted, the argument turned on the question, whether the gift had not altogether failed by the death of both legatees in the lifetime of the tenant for life. *Wagstaff v. Crosby* (*e*) is in our favor, and *Page v. May* (*f*) is undistinguishable from the present case. The natural period of survivorship is the death of the tenant for life, it being a forced and unnatural construction to suppose a testator to provide for survivorship among legatees who died before the period of distribution. *Browne v. Lord Kenyon* (*g*) is very similar to the present case. [*The LORD JUSTICE TURNER*: What do you say to the words "his executors, administrators or assigns" in the present case?] They are not substitutionary, but only a superfluous expression of intention that the survivor should

(*a*) 5 *Ves.* 207.*King*, 16 *Jur.* 489.(*b*) 4 *Madd.* 15.(*d*) 3 *Bro. C. C.* 90.(*c*) See *Crowder v. Stone*, 3 *Russ.* 217 (the marginal note is incorrect on this point); *Bright v. Rowe*, 3 *M. & K.* 316; *Ive v.*(*e*) 2 *Coll.* 746.(*f*) 24 *Beav.* 323.(*g*) 3 *Mad.* 410.

should take an absolute interest. In *Page v. May*, the expression "or their representatives" was used, which might with more reason have been considered substitutionary. *Antrobus v. Hodgson* (a) is not against us; the gift there was a contingent gift to the survivor. The cases referred to in Mr. Jarman's note to *Scurfield v. Howes* all support the view that the period of distribution is the period for ascertaining survivorship.

Mr. Peck in reply.

What I contend for is not opposed to the general rule on which the Respondents rely, the present case being wholly distinct in its nature from the class of cases in which that rule has been applied. If a fund is given to A. for life, remainder to B. and C. or the survivor of them, "survivor" may naturally be interpreted to refer to surviving the tenant for life. But if on the death of one of a set of legatees his share is given over to the survivors of them, it is a forced construction to hold that "survivors" means anything else than those of the legatees who survive the one so dying. In *Page v. May*, which is cited against us, this point did not call for decision, the claimant being the representative of the three legatees none of whom survived the tenant for life, and the only question was whether the gift to them had absolutely failed. In *Harrison v. Foreman*, the words "living at his decease" made the matter plain. *Brown v. Lord Kenyon* turned on the words "if he be then dead."

Judgment reserved.

The LORD CHANCELLOR, after stating the clause in the will, proceeded as follows:—

The testator having died soon after making his will,
his

(a) 16 *Sim.* 450.

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his son *Edward Prichard* having died in 1856, and his widow and *Arthur White*, his grandson, being still alive, the question arises upon the construction of this clause of the will, whether *Arthur White*, the grandson, is entitled to a vested and indefeasible interest in the funds now representing the said sum of 5,000*l.* subject to the life interest of the testator's widow therein.

I am of opinion that this question ought to be answered in the affirmative.

According to the grammatical and natural meaning of the language of the will, such I think must be taken to have been the intention of the testator. In case either the son or grandson should die in the lifetime of the widow, the whole sum of 5,000*l.* was to go to the survivor of the son and grandson, his executors, administrators, or assigns. The *survivorship* was that of the son surviving the grandson, or the grandson surviving the son. The ultimate disposition of the fund was to be determined on the death of the son or grandson in the lifetime of the widow, without any consideration as to either of them surviving the widow.

According to the contrary construction contended for, it is admitted that if the grandson should survive the widow he would be entitled to the whole; but the son and grandson are supposed to have taken a vested interest in a moiety of the 5,000*l.* liable to be divested only on the double contingency of one of them dying in the lifetime of the widow, and the other surviving her. I cannot think that the testator had any notion that the personal representatives of the predeceasing son or grandson could have any interest in the fund. It is allowed that the whole was to go to the son or grandson if he survived the widow, and it would seem strange that the representatives

representatives of the predeceasing son or grandson, who could make no claim if the survivor of the two should survive the widow, should be entitled to a moiety if both died in the widow's lifetime. In the absence of any words expressly to denote such an intention, I think (irrespective of the authorities) that in the event that has happened the same effect is to be given to this clause as if the grandson alone had been named as legatee after the death of the widow.

Referring to the authorities relied upon by Mr. *Follett* in his able argument, I think the only principle established by them is, that a gift once vested shall not be divested except on the happening of the precise event *or events*, upon the happening of which the substituted gift was made by the testator to depend. Here the defendants, to apply this principle, must show that the divesting of the gift of the moiety of the 5,000*l.* to the son was only to take place on the grandson surviving the widow. This seems to me to be contrary to the manifest intention of the testator who defines the contingency to be only the grandson surviving the son, not adding the grandson surviving the widow.

The strongest case in favor of the Respondents seems to be that of *Browne v. Lord Kenyon* (a). Bequest from and after the death of the survivor of two tenants for life, upon trust to pay 1,000*l.* to Sir *John Chetwoode*, "but if he be then dead, then to pay the said 1,000*l.* to his two brothers, *Charles* and *Philip*, in equal shares, *or the whole to the survivor of them.*" *Charles* and *Philip* as well as Sir *John* died before the surviving tenant for life (a lady), and it was held that, there being no person at her decease answering the description of "the survivor," the

(a) 3 *Madd.* 410.

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the estates of *Charles* and *Philip* took equally; upon the ground that the event had not happened, upon the happening of which the gift was to be divested. But there the will contained expressions clearly indicating that the date at which the testatrix meant the survivorship to be ascertained, was that of the death of the last tenant for life.

So, in *Belk v. Slack* (*a*), the bequest was upon trust for *A.* for life, and after the decease of *A.* and *B.* the same fund was given to *C.* and *D.*, to be equally divided between them “*or to the survivor or survivors of them.*”

In *Harrison v. Foreman* (*b*), the substituted gift is in express terms “*to the survivor living at the decease of*” the tenant for life. There being no such survivor, the prior gift was held not to have been divested.

While there does not seem to be any authority standing in the way of the construction for which the Appellant contends, *Scurfield v. Howes* (*c*), an authority entitled to great respect, is directly in his favor. There the testator bequeathed 500*l.* to *A.* for life, and after her decease to her two children, share and share alike; but if either of them should die before the decease of their mother, the whole to the survivor. Both died in the mother's lifetime, and it was held that the whole sum of 500*l.* belonged to the representatives of the survivor. This was the solemn decision of a very considerable judge, Lord *Alvanley*, when Master of the Rolls. For the assertion that it has been overruled there seems to me to be no foundation. On the contrary it appears to have been followed

(*a*) 1 *Keen*, 238.

(*b*) 5 *Ves.* 207.

(*c*) 3 *Bro. C. C.* 90.

followed in several subsequent cases cited by the Appellant's counsel.

For these reasons I feel bound, however reluctantly, to differ from his Honor the Master of the Rolls on the construction of this will.

The second question submitted to us is a mere corollary to the first, and the answer must be "that the Defendants (the trustees) with the concurrence of *Mary Prichard*, the widow, will be justified in carrying into execution the arrangement for the sale of the said capital sum in the manner stated."

I think there should be no costs of the appeal except of the executors which will come out of the residue.

*The LORD JUSTICE BRUCE.*

I am of the same opinion.

*The LORD JUSTICE TURNER.*

I am entirely of the same opinion. The case was very cleverly put in argument by Mr. *Follett* on the part of the Respondents. He said, as I understood his argument, that, in the case of a bequest to *A.* for life and after his death to *B.* and *C.* or the survivor of them, it was settled by the authorities that the survivorship was to be referred to the period of distribution—the death of *A.*; that the settled construction of such a bequest was that it meant that if *B.* or *C.* died in the lifetime of *A.* the other of them surviving *A.* was to take the whole, and that what the authorities had settled in that case being expressed in this the same consequence must follow: but on considering

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sidering this argument I think it will be found to be more ingenious than sound. Where there is a bequest to *A.* for life and after his death to *B.* and *C.* or the survivor of them, some meaning must of course be attached to the words "the survivor." They may refer to any one of three events—to one of the persons named surviving the other, to one of them only surviving the testator, or to one of them only surviving the tenant for life, and in the absence of any indication to the contrary they are taken to refer to the latter event as being the more probable one to have been referred to; but where, as in the present case, the bequest is to *A.* for life and after his death to *B.* and *C.*, and in case either of them dies in the lifetime of *A.* the whole to the survivor, it is plain that the words in their natural import refer to the one surviving the other, and the question is not to which of the events above mentioned the testator intended to refer, but whether there is any context to alter the ordinary meaning of the words which he has used. There does not appear to me to be any such context in this case, and I think, therefore, with all respect to the Master of the Rolls, the decree must be altered accordingly. The case is more strong in favor of the Appellant from the words, "his executors, administrators or assigns," being added to the limitation in favor of the survivor, but I do not think our judgment requires the addition of that circumstance to support it, and I prefer deciding it upon the more general ground. For the reasons which I have given, I do not think that the case of *Scurfield v. Howes* is, as suggested by the late Mr. *Jarman*, at variance with the other authorities to which he has referred.

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RANKIN v. LAY.

THIS was an appeal from the decree of Vice-Chancellor *Stuart*, dated the 28th *February*, 1860, for the specific performance on the part of the Defendant *Sarah Lay*, of an agreement to grant a lease of a farm to the Plaintiff.

The agreement was in the following terms :—

“ Memorandum of an agreement made the 3rd of *October*, 1855, between *Sarah Lay*, of *Wakes Colne*, in the county of *Essex*, widow, of the one part, and *Alfred Rankin*, of *Park Hall, Gosfield*, in the said county, gentleman, of the other part.

“ The said *Sarah Lay* agrees to let, and the said *Alfred Rankin* to hire, from the 29th day of *September* last, the messuage, farm and lands now in the occupation of the said *Sarah Lay*, as devisee for life thereof under the will of her husband the late Mr. *Robert Lay*; the term of years to be twelve, provided the said *Sarah Lay* shall so long live, and provided no forfeiture of the copyholds be incurred; the rent to be 220*l.* per annum payable half-yearly, subject to the following reduction, that is to say, the rent to be 210*l.* per annum, in case the average price of wheat for the preceding year shall have been 14*l.* per load at *Colchester Market*, and a reduction to 200*l.* per annum if such average shall have been under 12*l.* a load. The repairs to be done by the tenant, the landlady finding rough materials. With regard to repairs now wanted, it is understood between

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Where, in a suit for specific performance of an agreement for a farming lease, there is a conflict of evidence on the question whether the plaintiff has committed breaches of covenant which would have created a forfeiture of the lease if granted, the Court will decree specific performance, directing the lease to be ante-dated, so as to enable the Defendant to try the question at law. But such a decree will not be made unless the conflict of evidence leaves it in doubt whether there has been any breach which would render it proper to re-

fuse specific performance. A breach for that purpose must be serious and wilful. Import of a covenant to farm on the four-course system.

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the parties that the said *Sarah Lay* shall, at her option, either do the same forthwith, or allow the said *Alfred Rankin* such a sum of money as shall be agreed on by the parties about to value on behalf of the landlord and tenant. The said *Alfred Rankin* to reside in the farm-house, and to farm the lands in a good and husbandlike manner on the four-course system, and not to break up any pasture; and with regard to the pasture land hereby let, it is understood that the same is so let subject to any existing common rights. The said *Alfred Rankin* to consume all hay, straw, and clover and green crops on the said premises, and to spread the manure arising therefrom on such portion of the land as most requires it; nevertheless it is understood that the said *Alfred Rankin* may sell off part of the hay, provided the value thereof be expended in the purchase of oil cake or other food to be fed out by cattle on the premises, or in the purchase of artificial manure of like value. And it is mutually understood that, on the termination of the tenancy, a valuation shall be made between the parties hereto, or their representatives, in the same manner as at the commencement thereof. The tenant not to cut down or injure any timber or other trees, but to be allowed to lop and top the pollards in the customary manner. The tenant to be at liberty to kill game. The said *Sarah Lay* to have a right of entry at all reasonable times, and for any reasonable purpose. Each of the parties agree, at the request of the other, to execute any document that can be reasonably required for giving greater effect to these presents. Witness the hands of the respective parties the day and year first above written.

*"Sarah Lay."*

*"Alfred Rankin."*

In pursuance of this agreement the Plaintiff forthwith entered upon the farm, and had ever since continued in the occupation and possession of it.

On

On the 20th *December*, 1859, the Defendant *Sarah Lay*, in the names of herself and of a mortgagee of the farm, who was also a Defendant, caused the Plaintiff to be served with a notice to quit, on the alleged ground of the Plaintiff not farming the lands in accordance with the terms of the agreement, and on the 26th of *December*, 1859, the Defendant and her mortgagee commenced an action of ejectment against the Plaintiff.

Subsequently to the service upon *Rankin* of the notice to quit, two half-years' rent became due, which was tendered by *Rankin* to and accepted by *Sarah Lay*, and for which she gave, through her agent, a receipt in the following form:—

“*Braintree, Nov. 7, 1859.*

“Received of *A. Rankin*, Esq., 92*l.* 14*s.* 7*d.* for balance of his rent due to Mrs. *Lay* at *Michaelmas* last (without prejudice to any question between them as to notice to quit and mode of farming).

“*E. G. Craig.*”

The Plaintiff then filed the bill in this suit against *Sarah Lay* and the mortgagee, alleging that the statement contained in the notice to quit was false; that the premises comprised in the agreement were, when the Plaintiff entered, in a very bad condition; that the Plaintiff on the faith of the agreement had laid out large sums upon the farm in repairs and improvements; and that the Plaintiff had ascertained from the mortgagee that he claimed to be entitled to the legal estate, and not to be bound by the agreement between the mortgagor and the Plaintiff, but to be entitled to the possession of the farm and premises notwithstanding that agreement.

The bill prayed that the Defendant *Sarah Lay* might

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be decreed specifically to perform the agreement; and to execute to the Plaintiff a lease of the premises comprised therein in conformity with the agreement; that the mortgagee might, if necessary, be ordered to concur in the execution of the lease; or, if the Court should be of opinion that the mortgagee was not bound to concur in the lease, then that the mortgagor might redeem the mortgage, or that the Plaintiff might be at liberty to redeem it; and, finally, for an injunction to restrain the Defendants from further proceeding with the action of ejectment already commenced against the Plaintiff, and from bringing any fresh action for the recovery of the premises.

The main issue between the parties at the hearing before the Vice-Chancellor was, whether the Plaintiff had or not neglected to farm the premises in accordance with the covenants on his part, which would have been contained in a lease granted pursuant to the agreement, and thereby incurred a forfeiture of the lease.

The Vice-Chancellor, after hearing numerous affidavits on both sides upon this question, made the decree appealed against, declaring thereby that the agreement ought to be performed, and ordering the Defendant *Sarah Lay* to execute to the Plaintiff a lease of the premises comprised in the agreement for the term therein mentioned, such lease to bear date the 3rd *October*, 1855, the Plaintiff undertaking to admit in any action that might be brought under such lease for the recovery of the possession of the premises thereby demised, or upon any breach or breaches of any covenant or covenants to be contained in such lease, that such lease was executed on the day on which it should bear date. It was also ordered thereby, that the Defendant the mortgagee should join in and execute the lease; that an injunction should

issue

issue restraining the Defendants from further proceeding in their action of ejectment, and that the Defendants should pay to the Plaintiff his taxed costs in this suit, including his costs of the action at law.

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Mr. *W. D. Lewis* and Mr. *T. H. Terrell* for the Plaintiff.

Upon the question of breach of covenant, the evidence adduced in the cause is contradictory, and the Vice-Chancellor, after a careful consideration of it, has decided in favor of the Plaintiff. The Court will not refuse relief by way of specific performance unless breaches of a gross and wilful character have been proved; *Parker v. Taswell* (*a*) ; *Gregory v. Wilson* (*b*). Where there is a conflict of evidence, whether the covenants agreed upon have or not been broken, the practice has been to direct the lease to be ante-dated on a day antecedent to the alleged breaches, and to require from the Plaintiff an undertaking to admit in any action that the lease was dated on the day of its date; *Pain v. Coombs* (*c*) ; *Lillie v. Legh* (*d*). The acceptance by the Defendant *Sarah Lay* of rent accrued due after the alleged breaches of covenant, although the receipt is in form without prejudice, is a waiver of the forfeiture on the ground of such breaches; *Croft v. Lumley* (*e*).

Mr. *Craig* and Mr. *Erskine* for the Defendants.

The bill was not filed till notice of the trial of the action of ejectment had been served. This was such delay as to be a sufficient objection to a decree for specific performance. The bill also should aver performance of the covenants to be contained in the lease on the Plaintiff's part. Here there is no such averment in the bill,

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| (<i>a</i>) 2 <i>De G. & J.</i> 559. | (<i>d</i>) 3 <i>De G. & J.</i> 204. |
| (<i>b</i>) 9 <i>Hare</i> , 683. | (<i>e</i>) 6 <i>H. L. Cas.</i> 672. |
| (<i>c</i>) 1 <i>De G. & J.</i> 34. | |

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bill, and the evidence proves the contrary to have been the case. It is not because there are slight and unsupported contradictions of substantial evidence, showing breaches of covenant to have been committed, that the Court will decree specific performance, and leave the lessor to try the whole question over again at law, depriving him of his legal right to re-enter in the meantime. Now here the evidence is substantially all on one side. It shows that the farm has not been properly cultivated on the four-course system; that clover has been mowed twice; that farm produce has been sold off the premises without any such an equivalent as is provided by the agreement; and that the farm has been allowed to be altogether out of repair. These are substantial and fatal breaches of covenant, and the Court never gives relief by decreeing specific performance of an agreement for a lease, where there has been a breach of the covenants which would be contained in the lease; *Nunn v. Truscott*(a); *Reynolds v. Pitt*(b); *Hill v. Barclay*(c); *Green v. Bridges*(d); *Gregory v. Wilson*(e); *Lewis v. Bond*(f); *Bracebridge v. Buckley*(g); *Flint v. Brandon*(h); *Rayner v. Stone*(i). The rent was paid and accepted without prejudice to any question, and is not therefore a waiver of a forfeiture for breaches of continuing covenants; *Blyth v. Dennett*(k); *Price v. Worwood*(l).

Mr. Lewis was not called upon to reply.

The LORD CHANCELLOR.

This case has been most ably argued on the part of the

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| (a) 3 <i>De G. & S.</i> 304. | (g) 2 <i>Price</i> , 200. |
| (b) 19 <i>Ves.</i> 134. | (h) 8 <i>Ves.</i> 159. |
| (c) 16 <i>Ves.</i> 402. | (i) 2 <i>Eden</i> , 128. |
| (d) 4 <i>Sim.</i> 96. | (k) 13 <i>C. B. Rep.</i> 178. |
| (e) 9 <i>Hare</i> , 683. | (l) 4 <i>H. & N.</i> 512. |
| (f) 18 <i>Beav.</i> 85. | |

the Appellants by Mr. *Craig* and Mr. *Erskine*. But after having heard both those learned gentlemen, I am bound to say, that I think the decree ought to be affirmed.

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Now, the first objection to the application for specific performance was made upon the ground of delay. I agree that, if there had been unreasonable delay in asking for specific performance, that would be a sufficient ground for refusing it. But can it be said that there was any unreasonable delay here? The parties were going on for a considerable time without any serious difference, and both parties seemed disposed to go on without either of them asking that the lease should be executed. It very often happens, that there is an agreement for a lease for a certain time, but that no lease is executed, the parties going on during the term merely upon the agreement. That seems to have been the intention of both sides here for a considerable time; and I cannot see, that, until the ejectment was brought which rendered it indispensably necessary that the Plaintiff should come and ask for specific performance, any delay had occurred which should debar him of the right to specific performance. Although he did not immediately file his bill for specific performance, he filed it in quite sufficient time to prevent the action of ejectment having any operation, if it was improperly brought. I do not think, therefore, that there has been laches on his part, which would prevent him from having any remedy which he would be otherwise entitled to.

Now, it is admitted that he is entitled to a specific performance unless there have been breaches of the covenants on his part, which would have worked a forfeiture of the lease if granted. If such breaches were made out, they would be an answer to the bill, and would entitle the Defendants to a reversal of the decree which has been pronounced

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pronounced. I think that the cases of *Gregory v. Wilson* (*a*), and *Lewis v. Bond* (*b*), are well decided, and I mean entirely to be bound by the doctrine there laid down. If there has been a breach of the agreement, that is to say, if there has been what would have amounted to such a breach of any covenant, which ought to have been introduced into the lease (had it been granted) as would have worked a forfeiture, and that is clearly made out, then that is an answer to the bill and specific performance should not be decreed. But if that is not made out, then I think the proper course to be adopted is that which was adopted in the two cases that have been referred to, of *Pain v. Coombs* (*c*), and *Lillie v. Legh* (*d*), which is, to decree specific performance, and to direct that the lease should bear date at the date of the agreement, giving the landlord the opportunity, if he thinks fit, of bringing an action of covenant upon the lease, or bringing an ejectment for the forfeiture and so of recovering possession of the premises. The same judge who decided the case of *Gregory v. Wilson* (*a*), concurred in the decision of *Pain v. Coombs* (*c*); and what is there laid down to have been decided is, that, there being a conflict of evidence upon the question whether the covenants agreed for had not been already broken, the proper decree was to direct the lease to be dated at a time antecedent to the alleged breach, and to require from the Plaintiff an undertaking to agree in any action that the lease was executed on that day.

We must, however, be cautious in putting a proper construction upon the expression "conflict of evidence;" for evidence, merely contradictory, would be no sufficient ground

(*a*) 9 *Hare*, 683.

(*b*) 18 *Beav.* 85.

(*c*) 1 *De G. & J.* 34.

(*d*) 3 *De G. & J.* 204.

ground for a decree for specific performance, unless the contradiction is such as to leave it in doubt whether there has been such a breach of covenant as to render it expedient and proper to refuse specific performance upon that ground.

In the present case there is not only contradictory evidence, but there is a conflict of evidence within that meaning of the word; for I must say that, upon this evidence, I am not satisfied that there has been a breach of the covenants which would have worked a forfeiture of the lease, and would have entitled the landlord to maintain an action for a breach of the covenants, and so, as upon forfeiture, to recover possession of the premises. The inclination of my mind at present is on the other side. It is not every breach that will be sufficient; it must be a serious, wilful, deliberate breach, which would work a forfeiture, and would render the lease void. Now, with regard to the different breaches of covenant alleged—the departure from the four-course system;—the mowing clover twice in a year;—the selling the produce of the farm off the premises;—and the repairs—there is not, under any one of these heads, evidence that at all satisfies me that there would have been a forfeiture of the lease, and that an action of ejectment must necessarily have succeeded. With regard to the four-course system, any slight departure from it would not necessarily work a forfeiture. There is considerable difference of opinion as to the four-course system, and what constitutes a breach of that system, particularly with regard to fallow; what would be a breach of the covenant that the land should lie fallow one year; whether a green crop is allowed, and what green crop is allowed. All that is left in doubt. There is, indeed, evidence to show that there was really no breach of covenant in that respect on the part of the Plaintiff. There is not only his own evidence, but the evidence of other

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other persons who say that the four-course system was substantially pursued, and that the farm is now in better condition than it was at the time the agreement was entered into. As to mowing clover twice, I do not suppose that that would be such a breach of the covenant as would have been considered a proper ground for the forfeiture, or would have induced a jury to find for the Plaintiff in an action of ejectment.

Then as to the selling part of the produce off the farm without bringing back an equivalent: upon that the evidence is contradictory; but if it can be proved that the farm is in a better condition than it was in at the time when the agreement was entered into, that would lead to the fair inference that there had been no deterioration of the farm by sending out the produce of the farm without an equivalent being brought in. As to the repairs, I think it stands uncontradicted that the repairs of the farm are at present in an unsatisfactory state; but it is asserted on the part of the Plaintiff, and sworn to, that the repairs which ought to have been done on the part of the Defendant were not done, and he accounts in that manner for the condition in which the farm now is.

Upon the whole, I think there is not by any means such a case made out on the part of the Defendant as to show that there was a clear breach of the covenants that ought to have been in the lease, so that a forfeiture would have been worked and an ejectment could have been maintained.

A question has also been raised with regard to waiver, which it is not for me to determine. Not only was the rent received, but with regard to part of the breaches of the covenant that are complained of, they were done with

with the knowledge of the Defendant; and although she says that she complained, that is denied on the other side, and upon that point the evidence is contradictory.

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I think that, according to the doctrine laid down and acted upon in *Pain v. Coombs* (a), Vice-Chancellor *Stuart* was fully justified in making the decree which is under appeal, and which I think ought to be affirmed, except that the proceedings in ejectment should be stayed without costs. As, however, the appeal was brought not upon that part of the decree, but on the ground of specific performance being decreed, the Appellant must pay all the costs of the appeal.

(a) 1 *De G. & J.* 34.



CARNE v. LONG.

THIS was an appeal from a decree of Vice-Chancellor *Stuart*, declaring valid and effectual the following devise contained in the will of *Richard Long*, the testator in the cause, dated the 22nd January, 1853.

After directing payment of his debts and funeral and testamentary expenses out of his personal estate, and making

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The *Penzance Public Library*
was established
and kept on
foot by the
subscriptions
of certain
inhabitants of

Penzance, for the purpose of purchasing and preserving books for the use of such subscribers. The subscribers were elected by ballot, and the management of the library conducted, according to printed rules, by officers chosen by the subscribers from amongst themselves. By one of these rules it was provided, that the property in the books and everything else belonging to the library should be altogether vested in the officers for the time being, who should be trustees for the subscribers; and another rule provided that the institution should not be broken up so long as ten members remained:—*Held*, that a devise of freeholds to the trustees for the time being of the *Penzance Public Library*, to hold to them and their successors for ever, for the use, benefit, maintenance and support of the said library, was void, as tending to a perpetuity.

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making certain specific devises and bequests, and giving all his other real and personal estate to the trustees therein named, their heirs, executors, administrators and assigns, according to the nature and quality thereof respectively, upon trust in the first place to pay and discharge all his debts, funeral and testamentary expenses, and in the next place in trust for the only use and benefit of his wife for and during her natural life, the will proceeded as follows :—" And from and after the decease of my said wife I give and devise all that my freehold mansion house and premises called *The Abbey*, situate in *Penzance* aforesaid, with the appurtenances thereunto belonging, unto the trustees for the time being of the *Penzance Public Library*, to hold to them and their successors for ever, for the use, benefit, maintenance and support of the said library."

Upon the decease of the testator's widow in 1857, the bill in the present suit was filed by the trustees of the *Penzance Public Library*, praying that the devise in their favor contained in the testator's will might be declared good and valid, and that all necessary directions might be given for vesting the legal estate therein in the Plaintiffs.

The *Penzance Public Library*, it appeared, was established in 1818, by means of the voluntary subscriptions of certain inhabitants of that town, its original members, for the purpose of purchasing and preserving books for the use of the subscribers. The members were eligible by ballot, and the management of the institution was conducted in accordance with certain printed rules by officers chosen from amongst themselves by the general body of subscribers. Amongst these rules were the following :—

" Rule 1.

“ Rule 1.—Subscribers of one guinea annually, being duly elected and paying one guinea entrance, shall be ordinary members.

“ Rule 2.—Subscribers of ten guineas shall be ordinary members for life.

“ Rule 3.—Annual subscribers of two guineas, and life subscribers of twenty guineas, shall be also members of the committee.

“ Rule 7.—Strangers who have not resided in *Penzance* or its neighbourhood more than three months, may (on the recommendation of a member entered in a book called the visitors' book) have access to the library, and the privilege of reading the books there for one month only.

“ Rule 27.—The property in the books, and everything else belonging to the library, shall be altogether vested in the officers for the time being, who shall be trustees for the subscribers; and no member shall have any individual right or property therein, or shall, on pretence of such right, retain any book, refuse to pay any fine, or break any of the rules that are now or may hereafter be adopted.

“ Rule 28.—None of these laws which may hereafter be made shall be altered, but at the annual general meeting; a notice of any proposed alteration must be stuck up in the library at least one month before such notice.

“ Rule 29.—The institution shall not be broken up as long as ten members remain; but whenever the number shall be reduced below ten, all donations shall be returned to the donors, or their representatives, who may claim the same; and the remaining books and other articles shall be forthwith sold by public auction, and the

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Longa.

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the proceeds appropriated to the foundation or support of some scientific institution in the town of *Penzance*, to be determined by a majority of the remaining members.

Mr. Malins and **Mr. Eddis** for the Plaintiffs.

It is admitted that the society could not take the benefit of this devise if it were a body in the nature of a corporation aggregate. But it cannot be so regarded; nor can the gift to it be considered as a gift to a charity, for it is not for a public purpose. The gift might have been void if made for the benefit of a public library belonging to the crown; *Trustees of the British Museum v. White*(a). But this library is not a public one in that sense, for although any inhabitant of *Penzance* might become a member by payment of the subscription, still the beneficiaries can be regarded only as a limited class. The trust here is not in the nature of a public dedication, but rather of a gift to a number of private persons; *Liley v. Hey* (b). [The LORD CHANCELLOR: Is not the case governed by the late decision in *Thomson v. Shakespear* (c)? By one of the rules of the society, it is provided that the institution is not to be broken up so long as ten members remain. Does not that show that the testator must have contemplated a gift in perpetuity?] The object of the gift in *Thomson v. Shakespeare* (c) was to keep on foot a museum as a perpetual memorial of *Shakespeare*, an object which could only be effected by means of a gift in perpetuity. In the present case the body of subscribers might, without violating the terms of the gift, alienate at any time the property devised, and apply the proceeds in the purchase of books or other articles necessary for the use of the society.

Mr.

(a) 2 S. & S. 594.

(c) 1 De G., F. & J. 399.

(b) 1 Herr, 580.

Mr. Bacon and Mr. Bovill for the heir-at-law, were not called upon.

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The Lord Chancellor.

I think that this devise falls within the principle of the recent decision of *Thomson v. Shakespear* (a); that it must lead to a perpetuity; and that it is not therefore for a lawful purpose.

I agree with the Vice-Chancellor, that this is not a charity within the meaning of the Statute of Mortmain, but I do not know that I quite concur in all his remarks about the duty of the Court to struggle against the application of the Mortmain Act. That act was passed to remedy what was considered a great public mischief, and I do not know that it is a great interference with the rights of a person to prevent him, when on the point of descending into the grave, from making a disposition of his property away from his family in *sæcula seculorum*.

I look upon this as a devise for the benefit of a society of individuals in *Penzance*. My objection to it is, that it tends to a perpetuity, an objection with which the Vice-Chancellor does not appear to have dealt, but which appears to me wholly fatal to the devise. The clear intention of the testator, as expressed by the will, is, that this should be a gift in perpetuity to this institution at *Penzance*. The gift is to the trustees for the time being of the society and their successors, to be held to them and their successors for ever, they holding it for the use, benefit, maintenance and support of the library. If the devise had been in favor of the existing members of the society, and they had been at liberty to dispose of

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(a) 1 *De G., F. & J.* 399.

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the property as they might think fit, then it might, I think, have been a lawful disposition and not tending to a perpetuity. But looking to the language of the rules of this society, it is clear that the library was intended to be a perpetual institution, and the testator must be presumed to have known what the regulations were. By one of these it is provided, that the society is not to be broken up so long as ten members remain.

The devise, therefore, is for the benefit of a subsisting society, and one which is intended to subsist so long as ten members remain, and the property comprised in the devise is therefore to be taken out of commerce and to become inalienable, not for a life or lives in being and twenty-one years afterwards, but for so long as ten of the members of the society shall remain. This seems to me a purpose which the law will not sanction as tending to a perpetuity; and I think the recent decision in *Thomson v. Shakespear* is in point and governs the present case.

The decision of the Vice-Chancellor must therefore be reversed without costs, and the devise declared to be void.

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DRAKE v. SYMES.

THIS was a motion by the Plaintiff to discharge an order of Vice-Chancellor *Wood*, directing that interrogatories which had been filed for examination of the Defendants, in answer to the amended bill, should be taken off the file, with leave to the Plaintiffs to file fresh interrogatories before the 7th of *June*.

The original bill was filed by the Plaintiffs on the 5th of *May*, 1859, on behalf of themselves and all other the shareholders in a life insurance society (except the Defendants) against the directors. An answer was put in to which exceptions for insufficiency were allowed (a). The Defendants, on the 11th of *January*, 1860, put in a further answer. The Plaintiffs, on the 27th of *March*, 1860, amended their bill, adding other Defendants, and filed interrogatories, going through the whole of the statements in the amended bill, which were to a great extent the same as those of the original bill, and by the note at the foot required each of the Defendants to answer all the interrogatories. The original Defendants moved to take the interrogatories off the file, and an order to the effect above mentioned was made by Vice-Chancellor *Wood*.

Mr. Locock Webb for the Plaintiffs, in support of the appeal motion.

It was necessary to call upon the new Defendants to answer all the interrogatories. What the Plaintiffs have done is both regular and proper, as regards them, and the interrogatories ought not to be taken off the file. Even

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TICES.

After the defendants to an original bill had answered the interrogatories, the Plaintiff amended his bill, adding fresh statements and new Defendants, but retaining most of the materials of the original bill. He then filed interrogatories, going through the whole of the statements of the bill as amended, and required each of the Defendants to answer all the interrogatories.

Held, that an order made on the application of the original Defendants, that the interrogatories should be taken off the file, with liberty for the Plaintiff to the new interrogatories within a limited time, had been rightly made.

(a) See *Jahns.* 617.

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as to the original Defendants, there is no sufficient reason for so doing, they are not obliged to answer again anything which they have already answered.

Mr. *W. M. James* and Mr. *Cotton* in support of the Vice-Chancellor's order.

Such interrogatories as these are an abuse of the process of the Court. It may be proper to call upon new Defendants to answer them all, but the Plaintiff ought not to be allowed to throw upon the original Defendants the burden of picking out and declining to answer so much of them as has already been answered, which amounts to the greater part of them. The Court will not allow the mere fact of some other persons having been made Defendants to protect the interrogatories from being taken off the file; if such were to be the rule, the making a person a party on the most frivolous pretence might be made a means of oppressing the original Defendants.

Mr. *L. Webb* in reply.

*The LORD JUSTICE KNIGHT BRUCE.*

The motion before the Vice-Chancellor was made, as I understand the case, by persons who were the only Defendants to the original bill, and who had answered the original bill, and who must be taken in form at least, but as I think in substance also, to have answered fully the interrogatories founded on the original bill. The bill is then amended, and certain materials are added; whether the addition of new Defendants is substantial or unsubstantial, I give no opinion; that point may be assumed either way. In the amended bill, all the original Defendants were retained, new interrogatories were filed, and these new interrogatories include the whole matter

matter of the bill, not only the matter introduced by amendment, but matter not inconsiderable in extent, which was in the original bill, and has been retained in the amended bill. The interrogatories then contain a note, requiring each of the Defendants to answer all of them. This requisition applies to the original Defendants as much as to the new; the original defendants are, therefore, required to answer over again almost every interrogatory which they had previously answered. I am of opinion that such a course, if not both irregular and oppressive, is substantially irregular, that the interrogatories were rightly ordered to be taken off the file, and that the present appeal motion ought to be refused with costs.

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The LORD JUSTICE TURNER.

I am of the same opinion. The object of the act 15 & 16 Vict. c. 86, and of the orders of the Court was that Defendants should not be required to answer as to matters with respect to which it was useless for them to answer, thus saving the expense occasioned by an answer as to immaterial points. This object would be defeated if such a course as has been taken by the Plaintiffs in the present case were to be allowed.

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Chancellor  
Lord  
CAMPBELL.*

Shares in a railway company, which had demised its undertaking to another railway company for 1,000 years, at a fixed annual rent, secured by power of re-entry, with an option to the lessees to become purchasers of the line: *Held*, to retain their quality of pure personal estate, and not to be an interest in land within the Statute of Mortmain.

TAYLOR *v.* LINLEY.

THIS was an appeal from the decision of Vice-Chanceller *Stuart*, by which a declaration was introduced into an order on further consideration to the effect that certain shares in the *Hull and Selby Railway Company*, in the Chief Clerk's certificate mentioned, and the dividends received thereon since the death of the testator in the cause, were pure personal estate bequeathed to charity, and formed part of the charity fund in the testator's will mentioned.

The following are the short facts of the case, which is reported below, in Mr. *Giffard's* reports (*a*).

The testator, by his will, dated the 6th *October*, 1853, bequeathed all his printed books, household furniture, and all such his monies and securities for money, and all such other part of his personal estate whatsoever and wheresoever not thereinbefore bequeathed, as might be lawfully bequeathed by him for charitable purposes and which he called his charity fund, to the trustees of his will, upon trust to keep the same separate and distinct from the proceeds of the sale of his real estate, and such parts of his personal estate as could not be lawfully applied to charitable purposes, and directed the property to be sold and the monies to arise from the sale to be invested in the names of his trustees and of the Reverend *Norfolk Jackson*, in the public stocks, or on mortgage of freehold or copyhold estates in *England* or *Wales*, to be held by them upon trust that the same should be distributed by them and the Mayor of *Beverley*, and the vicar of

*St. Mary's*

(*a*) *Vol. 1, p. 67.*

*St. Mary's Beverley*, for the time being, for the benefit of honest and deserving domestic female servants living within eight miles of the *Guildhall of Beverley*, in the manner, and subject to the regulations in the will mentioned.

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By the decree the usual administration accounts had been directed; and it was, amongst other things, ordered that, in taking the accounts of the testator's personal estate, such part thereof as could not by law be bequeathed for charitable purposes should be distinguished from such part thereof as could by law be bequeathed for such purposes.

The Chief Clerk, by his certificate dated the 14th *February*, 1859, certified that the executors had received personal estate not specifically bequeathed to the amount of 1,000*l.* 12*s.* 10*d.*, of which 520*l.* 1*s.* 4*d.* was by law bequeathed for charitable purposes; and 152*l.* 13*s.* 9*d.*, further part thereof was not so bequeathed; and 327*l.* 17*s.* 9*d.* residue thereof was also not effectually so bequeathed not being of the nature of pure personal estate, but having arisen from dividends in respect of shares in the *Hull and Selby Railway Company*, which dividends were paid out of the rents received by that company from the *North Eastern Railway Company*, as lessees of the whole of the *Hull and Selby Railway* under a lease, dated the 12th *May*, 1855, for the term of 1,000 years, at a fixed rent of 70,000*l.* But the certificate in this respect was expressed to be subject to the Court being of a contrary opinion. The certificate stated that the above-mentioned companies, by contract under seal, dated the 30th *June*, 1845, had agreed between themselves, in addition to the terms of the above lease, that the *North Eastern Railway Company* should, at any period during the continuance of the lease,

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lease, after the expiration of five years from the 1st *July*, 1845, having obtained the necessary powers from parliament for that purpose, and after giving six months' notice, have power to purchase the whole of the works and plant of the *Hull and Selby Railway Company*. The certificate further stated that the *North Eastern Railway Company* had intimated an intention of exercising their right of purchase under the contract, but that no formal notice had been given by them to that effect.

By the 114th section of the act 6 *Will. 4, c. lxxx.*, incorporating the *Hull and Selby Railway Company*, it was enacted, that all the shares in the undertaking or the joint stock or fund of the said company should, to all intents and purposes be deemed personal estate, and transmissible as such, and should not be deemed to be of the nature of real property.

By the statute 9 & 10 *Vict. c. ccxli.*, passed in 1846, the *Hull and Selby Railway Company* were empowered to lease for any term of years, and also absolutely to sell, their undertaking and the premises connected therewith to the *London and North Midland Railway Company* and the *Manchester and Leeds Railway Company*, or one of them as the case might be. By the second section of this act it was enacted that the purchase-money of the *Hull and Selby Company* should be paid to the directors thereof for the time being, to be held by them upon the trusts thereafter mentioned. By the fifth section it was provided that, upon payment of the purchase-money to the *Hull and Selby* directors as aforesaid, the acts relating to the *Hull and Selby Railway Company* should be and the same were thereby repealed.

The seventh section provided that, on payment of the
purchase-

purchase-money to the *Hull and Selby Railway Company*, that undertaking, with its works, plant, &c., was to become vested in the purchasing companies or company as the case might be.

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By the fifteenth section, it was provided that the directors of the *Hull and Selby Railway Company* were to stand possessed of the said purchase-money upon trust, after paying or providing for the payment of all debts, liabilities and engagements of the *Hull and Selby Railway Company*, to divide the purchase and other monies rateably between the several persons who, at the time of the payment of the purchase-money, or the balance or surplus thereof, as the case might be, should be proprietors of shares in the capital of the same company in proportion to the number and amount of their respective shares therein, and their respective executors, administrators and assigns.

By the *North Eastern Railway Company's Act, 1854* (17 & 18 Vict. c. ccxi.), the *York and North Midland Railway Company* was dissolved, and its undertaking, rights, property and effects united and vested with and in the *North Eastern Railway Company*, and the undertaking, and the liabilities and obligations of the dissolved company were also by the same act transferred to and imposed upon the *North Eastern Railway Company*.

The lease of the 12th *May*, 1855, referred to in the Chief Clerk's certificate, purported to be made in pursuance of an agreement contained in a deed of arrangement, dated *June 30*, 1845, between the *Hull and Selby Railway Company* of the one part and the *York and North Midland Railway Company* of the other part, and it reserved a power of re-entry by the
Hull

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Hull and Selby Railway Company for non-payment of the rent or breach of the covenants reserved and contained in the lease, and it contained a proviso that the demised premises were to be held subject to the right and privilege thereby reserved to the directors of the *Hull and Selby Railway Company* to hold their meetings in the rooms at the *Hull* station.

Mr. *Greene* and Mr. *G. O. Edwards* in support of the appeal.

We admit the general and well-established rule that shares in a railway company carrying on business in the ordinary way are pure personality. *Myers v. Perigal*(a); *Edwards v. Hall*(b). In the present case, however, we submit that the lease by the *Hull and Selby Company* to the *North Eastern Railway Company*, with the optional contract of sale, has changed the nature of the property in the shares. What the shareholders of the former company now receive is an aliquot share of a fixed rent for the demise of their land, secured by a power of re-entry. That is sufficient to impart a taint of realty to their shares, at least to the extent of preventing the property in them from being pure personality. *Toppin v. Lomas*(c); *Ware v. Cumberlege*(d). The *Hull and Selby Company* have here no longer any interest in the property of the line leased, but have only to look to a fixed rent issuing out of the land. They are, in fact, no longer a trading company, but are in the position of a landlord entitled to receive and demand, not a share of the profits, but an annual rental of 70,000*l.* from the lessees; and their shares, therefore, are no longer within the rule laid down in *Myers v. Perigal*(a)

and

(a) 2 *De G., M. & G.* 599.

(c) 16 *C. B.* 145.

(b) 6 *De G., M. & G.* 74.

(d) 20 *Beav.* 503.

and the other cases relating to railway companies still carrying on business. *Morris v. Glyn* (a).

Mr. F. G. A. Williams for another party in the same interest as the appellant.

Mr. Malins and *Mr. Bury* for the charity trustees.

The shares in the *Hull and Selby Railway Company* are admitted to have been pure personality the day before the lease. What the shareholders parted with by the lease was pure personality for an annual consideration of a fixed sum, the security remaining what it was before, viz. the profit to arise from working the railway, or pure personal estate. It is difficult to see how the taint of realty could arise upon the execution of the lease. The land is realty, but the Statute 6 Will. 4 and the authorities say, that the shares are pure personal estate. After the lease the *Hull and Selby* shareholders receive their dividends out of a sum of a fixed amount, but, with the exception of the covenants of the lessees, their security for the dividends is no higher than it was before. *Watson v. Spratley* (b); *Hayter v. Tucker* (c). The proviso that the directors of the *Hull and Selby Company* are to have the privilege of holding meetings at the *Hull* station, is for the purpose only of their receiving the rent when payable, and dividing it amongst the shareholders.

Mr. Greene in reply.

The lessees cannot be regarded as agents for the lessors for the purpose of earning profits and paying them out of such profits. If there should be no profit made in any particular year, the lessors would still be entitled to

(a) 5 *Jur. N. S.* 1047.

(c) 4 *Kay & J.* 243.

(b) 10 *Exch.* 222.

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to demand and receive the 70,000*l.* for rent. The *Hull and Selby Railway Company* having thus divested themselves of their trading capacity, their shares have been brought within the Mortmain Act.

He referred to *Baxter v. Brown (a)*.

The LORD CHANCELLOR.

The general rule is well established, that shares in a railway company carrying on business are pure personal estate. I am now called upon to say that, if a railway company, instead of carrying on business itself, enters into an arrangement with another railway company, such as that between the *Hull and Selby Railway Company* and the *North Eastern Railway Company*, in this case, the shares in the lessors' company cease, from the time at which that which is here called a lease is executed, to be pure personality. I was much struck with the argument of Mr. *Greene*, but it has not convinced me that the Vice-Chancellor's decision is wrong. In this case, after the lease had been executed, the *Hull and Selby Company* still continued to subsist as a railway company, consisting of directors and shareholders; and shares therein are held and transferred exactly in the same manner as they were previously to the lease, and at any time, on breach of any or either of the covenants in the lease, the company may re-enter and resume the working of their line. Then the question is, is the character of the shares to be considered as altered in the interval between the execution of the lease and the resumption of the line by the company on forfeiture? I think that they are not to be considered as changed in quality,

(a) 7 *Man. & G.* 198.

quality, and that they still remain pure personal estate. Although this is called a lease, regard must still be had to what the real character of the transaction was. The real arrangement was, that the *Hull and Selby Railway Company* were to allow the lessees to work the line, and make a profit on it, and out of that profit to pay a fixed sum per annum to the lessors. It was a fixed sum of 70,000*l.*, but I think in the result it is the same thing as if it had been a sum varying according to the amount of profit made by the lessees. The whole profit of the line is made by the lessees, but the rental paid to the lessors is part of that profit, and the nature of their property remains unchanged. Suppose the lease had been of part only of the line, and that instead of a letting for 1,000 years, it had been only for a day, as if the use of the *London and Epsom* line were let for a fixed sum during the *Derby* day. Would that have altered the character of the shares? I think not. That would only be reserving compensation out of the profits made by the persons called lessees, for the use of the line for a day. Therefore it seems to me that the Vice-Chancellor has taken the right view of this question, and that these shares are not an exception to the general rule, that shares in a railway company carrying on business are pure personality.

The appeal must be dismissed with costs.

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A mortgagee of a devisee filed a bill to enforce his security, and obtained a decree containing an inquiry as to the incumbrances on the estate. Immediately afterwards a legatee, whose legacy was charged on the estate and had priority over the mortgage, filed his bill to have the legacy raised. Held, that the decree in the other suit was no bar to his proceeding with his suit, for that a prior incumbrancer is not bound to go in under a decree obtained by a puisné incumbrancer, but is at liberty to institute a suit of his own.

A testator in 1815 devised an estate to *A.* for life, remainder to his sons successively in tail, remainder to *B.* in tail, and in 1818 made another will, devising the estate to *A.* for life, remainder to his sons successively in tail, remainder to *C.* in tail. Held, that a decree establishing the will of 1818, made in a suit to which *B.* was not a party, but *A.* and his first son were parties, as representing the inheritance, was not binding as between *B.* and *C.*

## ARNOLD v. BAINBRIGGE.

THIS was an appeal by the Plaintiffs from a decree of the Master of the Rolls dismissing their bill with costs, but without prejudice to such claim, if any, as they might be entitled to make in a suit of *Moss v. Bainbrigge*, in which a decree had been made.

The object of the suit was to raise two legacies of 1,000*l.*, given by a will dated in 1818 of *Thomas Bainbrigge*, the validity of which had been the subject of much litigation.

The testator in 1815 made a will, by which he devised to *Ann James, James Hall and James Blair*, his *Wood-seat* estate, upon trusts, which, for the present purpose, may be stated with sufficient accuracy as follows:— Upon trust for the separate use of *Mary Anne Bainbrigge* for life, and after her decease for her first and other sons successively in tail male, with remainder to her daughters as tenants in common in tail, with remainder to *Thomas Parker Bainbrigge* (the eldest son of the testator's brother *Joseph Bainbrigge*) in tail general, with remainder in trust for the second and other sons of *Joseph Bainbrigge* in tail general, and in default of such issue to the testator's own right heirs.

The

The testator, on the 17th of *June*, 1818, made a codicil, by which he gave legacies of 1,000*l.* a piece to the children of *Elizabeth Arnold*, payable at twenty-one, and made alterations in his will, the result of which was to produce a testamentary disposition substantially identical with that made by the will which is next stated.

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The testator, on the 18th of *June*, 1818, made another will, by which he devised the *Woodseat* estate to *James Blair, Robert Hood* and *John Hawthorn*, upon trust to pay to each of the children of *Elizabeth Arnold* the sum of 1,000*l.* on their respectively attaining the age of twenty-one, and subject thereto for *Mary Ann Bainbrigge* for life, and after her death for her sons successively in tail, with remainder to her daughters as tenants in common in tail, and in default of such issue, upon trust to raise and pay for each of the children of *Elizabeth Arnold* the further sum of 1,000*l.* to be paid on their respectively attaining the age of twenty-one, and subject thereto upon trust for the first and other sons of *Elizabeth Arnold* successively in tail, with remainder to her daughters as tenants in common in tail, with remainder to the testator's own right heirs.

The testator died on the 20th of *June*, 1818, and the second will was proved in *March*, 1819. *Joseph Bainbrigge*, named in the first will, was the testator's heir-at-law.

*Mary Anne Bainbrigge* married *George Alsop*, who assumed the name of *Bainbrigge*. She had two children, the eldest of whom, *Thomas Alsop Bainbrigge*, was born in 1830, and was the first tenant in tail under the limitations of each will.

*Joseph*

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*Joseph Bainbrigge* at first disputed the validity of the will of 1818; but afterwards, by a deed dated the 6th of December, 1820, he confirmed it, and on the same day entered into a written agreement with the trustees, *Blair, Wood and Hawthorn*, for the purchase from them of a small part of the testator's real estate.

This purchase was not completed, but *Joseph Bainbrigge* was let into possession, and in 1824 sold the benefit of the contract to *Thomas Parker Bainbrigge*.

In November, 1829, *Joseph Bainbrigge* filed a bill to set aside the confirmation of 1820 as obtained from him by misrepresentation, and to have the validity of the will of 1818 tried, and to obtain possession of the estates on the ground of intestacy. In June, 1830, the trustees and persons beneficially interested under the will of 1818 filed a bill against *Joseph Bainbrigge* and the persons claiming under the will of 1815, to perpetuate the testimony of witnesses in support of the will of 1818. And on the same day, *Mary Anne Bainbrigge* and her husband and *Thomas Alsop Bainbrigge* filed a bill against the other persons claiming under the will of 1818 to have the trusts of that will carried into execution. This suit was afterwards abandoned.

Pending these proceedings, the trustees of the will of 1818 brought ejectment against *Thomas Parker Bainbrigge* to recover possession of the land agreed to be sold by them to *Joseph Bainbrigge*. *Thomas Parker Bainbrigge* thereupon, on the 9th of June, 1831, filed a bill against the trustees and the persons beneficially interested under the will of 1818, asking for an injunction against the ejectment, and that proper directions might be given for ascertaining the validity of the will of 1818;  
and

and that, if it should be found valid, then the agreement of *December*, 1820, might be specifically performed.

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On the 29th of *July*, 1831, *Mary Anne Bainbrigge* filed her bill, stating both wills, and seeking to establish the will of 1818, and to have the trusts carried into execution; and by a supplemental bill she put in issue the deed of *December*, 1820, and prayed a declaration that it was binding on *Joseph Bainbrigge*, and that he was thereby estopped from disputing the validity of the will of 1818. None of *Joseph Bainbrigge's* children were parties to these suits, the Defendants being the trustees of the will of 1818, the persons claiming beneficially under it (*Thomas Alsop Bainbrigge* being before the Court as first tenant in tail), and *Joseph Bainbrigge* as heir-at-law. The children of *Elizabeth Arnold* were made parties, as being entitled to legacies charged on the real estate.

In *July*, 1833, a decree was made in the suit instituted by *Thomas Parker Bainbrigge*. The bill was dismissed with costs, as against all parties, except the trustees and *Joseph Bainbrigge*, and so much of the bill as impeached the validity of the will of 1818 was dismissed with costs as against them also, and a decree was made for specific performance, with the usual reference as to title.

On the 17th of *February*, 1835, a decree in the original and supplemental suits by *Mary Anne Bainbrigge* was made at the Rolls, establishing the will of 1818, and directing the trusts thereof to be carried into execution, and directing the usual accounts of the testator's personal estate, and inquiries as to his real estate.

*Thomas Parker Bainbrigge*, under the order of reference made in his suit, carried into the Master's office objections

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objections to the title to the purchased property, the principal objections being that the codicil and will of 1818 were invalid. In *June, 1838*, the Master reported in favor of the title, and his report was confirmed. It was alleged by the Plaintiffs in the present suit, that *Thomas Parker Bainbrigge* had withdrawn his objections to the title, by reason of an agreement for compromise entered into by him in the year 1835 with the trustees, by which he agreed to withdraw from all opposition to the will of 1818. A great amount of evidence was entered into upon this question, but the Court considered that no compromise having any such effect as was contended for was proved.

On the *27th of January, 1838*, *Mary Anne Bainbrigge* died, and the suits in which she was Plaintiff were prosecuted by her eldest son.

*Joseph Bainbrigge* died on the *12th of April, 1842*, leaving *Thomas Parker Bainbrigge* his eldest son and heir-at-law.

*Thomas Alsop Bainbrigge* died an infant, and without issue, on the *30th of September, 1843*. His sister, who was the only other child of *Mary Anne Bainbrigge*, also died an infant, and without issue, in *July, 1845*.

*Elizabeth Arnold* had several children who attained twenty-one. *William Arnold Bainbrigge* the eldest son took possession of the estates on the failure of *Mary Anne Bainbrigge's* issue, he being the next tenant in tail under the limitations of the will of 1818. *Thomas Arnold*, another of her children, assigned his first legacy of *1,000l.* to *Henry Arnold* by way of security. Afterwards, in 1845, he became bankrupt, and *Henry Arnold* was chosen creditors' assignee.

In

In 1845, *Thomas Parker Bainbrigge* instituted the suit of *Bainbrigge v. Baddeley* to impeach the will of 1818 (a), and in March, 1850, moved for an injunction to restrain *William Arnold Bainbrigge* from felling timber on the estate, and from receiving the rents, whereupon an order was made directing *Thomas Parker Bainbrigge* to bring an ejectment. *Thomas Arnold* was made a party to this suit, but his assignees were not.

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The ejectment was tried in 1850, and the Plaintiff obtained a verdict, but the Court of Common Pleas granted a new trial. Just before the cause was coming on for trial a compromise was entered into to the effect that *Thomas Parker Bainbrigge* should pay to *William Arnold Bainbrigge* 25,000*l.*, and that *William Arnold Bainbrigge* should convey the estate to him discharged of incumbrances created by *William Arnold Bainbrigge*, and of the legacies given by the will of 1818. A verdict for the lessor of the Plaintiff was taken by consent, subject to these terms.

Pending these proceedings a family arrangement had been made, by which *William Henry Bainbrigge*, a younger brother of *Thomas Parker Bainbrigge*, was to become entitled to the estates if recovered. The estate was accordingly conveyed to *William Henry Bainbrigge* in fee by *William Arnold Bainbrigge* and *Thomas Parker Bainbrigge* by a deed dated the 30th of June, 1852, duly inrolled as a disentailing assurance.

On the 18th of April, 1853, *John Moss*, who had been the solicitor of *Thomas Parker Bainbrigge* in the proceedings relative to this property, and also was a mortgagee of the interests of *Thomas Parker Bainbrigge* and

(a) See 9 Beau. 538; 2 Phill. 705.

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and *William Henry Bainbrigge*, filed his bill against them, and against the trustees of a marriage settlement made by *William Henry Bainbrigge*, to enforce his security.

On the 22nd of *November*, 1853, upon exceptions to the answers of some of the Defendants coming on before the Master of the Rolls, an order was made by arrangement directing, among other things, an inquiry what incumbrances there were affecting the estate, and who were entitled to the said incumbrances, and what were their priorities.

On the 12th of *June*, 1854, a decree was made establishing *Moss's* security, directing various accounts and inquiries, and continuing the inquiry directed by the last-mentioned order.

On the same day *Henry Arnold* filed his bill against *William Arnold Bainbrigge*, *Thomas Parker Bainbrigge*, *William Henry Bainbrigge*, and others, to have the two legacies of 1,000*l.* raised and paid, and to have the benefit, for that purpose, of the decree of *February*, 1835, and the other proceedings in that suit, and the suits supplemental to it. *Henry Arnold* having become bankrupt his assignees continued the suit by supplemental bill.

The cause came on to be heard before the Master of the Rolls, who, on the 23rd of *January*, 1860, dismissed the bill with costs, but without prejudice to such claim, if any, as the Plaintiffs might be entitled to make under the inquiry directed in *Moss v. Bainbrigge*. The Plaintiffs appealed.

In the meantime, on 9th *March*, 1860, a decree was made

made in a suit of *Moss v. Gregory*, relating to the same property, by which an inquiry was directed as to what incumbrances there were upon the estate, and what were their priorities, and an account of what was due upon them; and a sale of the estate was ordered, and the accounts and enquires taken and made in *Moss v. Bainbrigge* were to be adopted, subject to certain provisions giving a limited right to surcharge and falsify.

**Mr. Lloyd, Mr. Martindale, and Mr. Lindley,** for the Plaintiffs.

The decree of 1835 establishes the will, and we are entitled to the benefit of that decree without an issue. A devisee is not entitled to an issue as of course, *Whittaker v. Newman* (*a*). A tenant in tail represents the inheritance, *Lloyd v. Johnes* (*b*), and a subsequent remainderman, or reversioner, is bound by the decree unless he takes proceedings to set it aside by appeal or by a new bill for that purpose. *Thomas Parker Bainbrigge* is therefore bound by the decree of 1835; *Giffard v. Hort* (*c*) supports the same view; and *Pike v. Hoare* (*d*) is against his right to an issue, his acts and conduct preclude him from claiming one. Moreover *Thomas Parker Bainbrigge* is prevented by the compromise of 1835 from disputing the will. Now as to the course taken by the Master of the Rolls with our bill, the dismissal can only be supported on one of two grounds, that there was no case on the merits, or that the Plaintiffs had mistaken their remedy. On the merits his Honor gave no opinion, he proceeded solely on the ground that we had mistaken our remedy, for that we ought to have come in under the decree of 1835. We did not know of it till

*March,*

(*a*) 2 *Hare*, 299.

(*c*) 1 *Sch. & Lef.* 386—407.

(*b*) 9 *Ves.* 37.

(*d*) 2 *Ed.* 182.

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March, 1855, so, assuming that we have a case on the merits, we were entitled to the costs of our suit up to that time even if we were bound to come in under that decree. But we submit we are not so bound. *Moss v. Bainbridge* is a suit by an incumbrancer subsequent to us, there is an inquiry as to incumbrances, but we are not parties, nor entitled to prosecute the decree; so if *Moss* were paid off, or abandoned the suit, we should be left without remedy. The reasoning of Lord *Eldon* in *Paxton v. Douglas* (a) shows that a claimant is debarred from proceeding in his own suit only where there is a decree in another suit which he is entitled to revive and prosecute if the suit becomes abated. *Farrer v. Brereton* (b) supports the same view.

Mr. Follett and Mr. Rowcliffe, for Thomas Parker Bainbridge and for William Henry Bainbridge and the trustees of his settlement.

This bill was filed after notice of the decree in *Moss v. Bainbridge*, which was post dated, having been actually pronounced before the bill in this suit was filed. The case of compromise breaks down, no concluded agreement was ever come to, and at all events the decree is right in dismissing with costs so much of the bill as relates to that, and as regards costs that is the chief matter. But we say it is right altogether, the Plaintiffs actually went in under *Moss v. Bainbridge* for one legacy, and if they can go in why should the Court allow this useless litigation to proceed. *Moss* by his bill offered to redeem all prior incumbrances and he made the trustees parties, who represent the *cestui que trusts*; 15 & 16 Vict. c. 86, s. 42, rule 9; the Plaintiffs, therefore, are virtually parties to that suit; *Sale v. Kitson* (c). We are not bound by the decree

(a) 8 Ves. 520.

(c) 3 De G., M. & G. 119.

(b) 2 Moll. 93, sup.

decree of 1835. What the Plaintiffs contend for is this, that if a testator has made two wills, the validity of the latter of which is open to question, and the same person is first tenant in tail under each, but the ulterior limitations are different, a decree establishing the latter will in a suit to which no claimant under the former will, except the tenant in tail, is a party, establishes the latter will against all the remaindermen. Such a proposition is monstrous, and the remarks of Lord *Eldon* in *Lloyd v. Johnes* (a) show that he would not have held the remainderman bound in such a case. [The LORD JUSTICE TURNER referred to *Tweedell v. Tweedell* (b).]

Mr. *Prendergast*, for *Whitmore*, the assignee of
William Henry Bainbridge.

Mr. *Roundell Palmer* and Mr. *E. Webster*, for *Moss*.

The case set up as to compromise is wholly unjustifiable and completely fails. The point was adjudged by Lord *Cottenham* in 1845 (c). The question then is whether we are bound by the decree of 1835. To contend that we are is a misapplication of the doctrine that the first tenant in tail represents the inheritance. That rule means that where a suit is instituted to affect the estate the estate is sufficiently represented if the first tenant in tail is before the Court, but it was never intended to mean that a tenant in tail who is entitled *quâcunque viâ* represents the inheritance for the purpose of settling the rights *inter se* of persons whose titles are posterior to the estate tail. To make the rule apply two conditions must be satisfied, the suit must be in other respects properly constituted, which was not the case here, the legal estate not having been before the Court, and the suit must be so framed

as

(a) 9 *Ves.* 60.

(c) 2 *Phill.* 705.

(b) *T. & R.* 1.

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as to raise the point upon which it is sought to bind those coming after the estate tail. Now this suit was not so constituted as properly to raise the issue whether the will of 1815 was the last valid will. The trustees under the two wills were not all the same, and those under the will of 1815 were not all parties. The bill did not raise the issue whether the will of 1815 was good, *Thomas Alsop Bainbrigge* and his mother had a common interest and it made no difference to them which of the wills was the valid one. Supposing the Plaintiffs not bound to go in under *Moss v. Bainbrigge* they did go in for one legacy and cannot justify this litigation. *Thomas Parker Bainbrigge* was dealing only with his rights as purchaser not as devisee, in the suit instituted by him in which the title of the trustees of the latter will was found good, so he is not estopped; *Tucker v. Hernaman* (a). The Plaintiffs are bound by lying by *Bigg v. Strong* (b).

Mr. *Selwyn*, Mr. *Southgate*, Mr. *Kay*, Mr. *Bazalgette*, Mr. *Charles Hall*, Mr. *Rodwell* and Mr. *Field* appeared for other parties.

Mr. *Lloyd* in reply.

The trustees did not represent the legatees in *Moss v. Bainbrigge*, for they were not made parties in the capacity of incumbrancers, but only as having the legal estate; and 15 & 16 Vict. c. 86, s. 42, rule 9 does not apply, for it does not apply to any case of adverse title. The trustees did not claim the legacies in that suit, nor act as trustees for the legatees. It is clear from the answers in the present suit that if we had gone in for both legacies our claim would have been opposed, and we should have been put to prove the validity of the will of 1818. The case

(a) 4 *De G., M. & G.* 395.

(b) 3 *Sm. & Giff.* 592.

compromise was properly set up, for it had a most bearing on the question whether the devisees were entitled to an issue. The facts show that concluded compromise.

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I am of opinion, and I believe the Lord Justice to be also of opinion, that neither the validity of the codicil of 1818 as to real estate nor the validity of the will of 1818 as to real estate has for the present purpose received adjudication ; and that, unless by arrangement between the parties that course can be prevented, there must be an issue as to the validity of each of those two instruments, the same legacies being given by each, though, perhaps, not by way of double gift. It is said that there is not any disposition upon the part of any person to contest by further litigation the validity of the will of 1818 as to real estate, but a disposition not to contest it must be practically manifested in order to be of any effect. There will therefore be a decree directing an issue or issues, but it will not be drawn up at once ; time will thus be given to the persons interested, as well those not here as those here, to admit the validity of the will of 1818, so as to enable us to remit the legatees to obtain their legacies under the decree in *Moss v. Bainbrigge*. We give no opinion at present as to costs.

The LORD JUSTICE TURNER.

I am of the same opinion. The decree in *Moss v. Bainbrigge* is a decree in a mortgagee's suit, and if the Plaintiffs are entitled to go in under it they are not in my opinion bound to do so. There is no such rule as that a prior incumbrancer is bound to come in under a decree obtained by a puisne incumbrancer. An incumbrancer may suspend the proceedings in his own suit and so defeat the

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the rights of persons coming in under the decree; the case is therefore totally different from that of an ordinary creditor's suit, a decree in which is a judgment for all the creditors and may be prosecuted by any creditor. The question then is to what decree the Plaintiffs are entitled. In my opinion *Thomas Parker Bainbrigge*, and those claiming under him, are not bound by the decree of 1835. The tenant in tail who was before the Court in that suit was tenant in tail under each will, under that of 1815 as well as that of 1818, and it was of little importance to him which of the two wills was established. When new rights afterwards arise the parties having those rights cannot be bound as between themselves by a decree against a party in whom those rights were united.

Then if *Thomas Parker Bainbrigge* is not bound by the decree is he bound by anything else that has passed? We must determine which is the right will, and the ordinary mode of doing that is to direct an issue. An heir at law may by his conduct lose his right to an issue, and so no doubt may a devisee, but to take away that right it is necessary to make out a clear and strong case, and I do not see that any case sufficient to preclude *Thomas Parker Bainbrigge* from asking an issue has been made out in the present case. I am of opinion, therefore, that unless the parties can come to some arrangement an issue ought to be directed, and all questions as to costs reserved.

On 6th June the case was mentioned again, and all material parties in *Moss v. Bainbrigge*, and *Moss v. Gregory* being before the Court, and all parties who were *sui juris* agreeing to treat the will of 1818 as valid for the purposes of the present suit, and the Court being of opinion

opinion that it was not for the benefit of the parties who were under disability that an issue should be directed, an order was made declaring the legacies a charge on the real estates, and declaring the Plaintiffs entitled to go in and prove for them in *Moss v. Gregory*. The Plaintiffs were ordered to pay the Defendants their costs, so far as they had been occasioned by the allegations in the bill as to the compromise of 1835, and it was declared that the Plaintiffs were entitled to be paid their own costs, except so far as they had been occasioned by the allegations as to the compromise, and that they were entitled to have the amount of their costs (except as aforesaid), when ascertained, added to and paid as part of their incumbrances.

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In the Matter of FOSTER, a Solicitor.

Ex parte WALKER.

THIS was a petition, by way of appeal, from an order of Vice-Chancellor *Wood*, dismissing a petition for taxation of the Respondent's bill of costs after payment.

The Petitioner, Mr. *Walker*, who was a farmer, employed Mr. *Foster* as his solicitor from *October, 1855*, until the early part of the year 1859. In 1858, the

Petitioner

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W. employed
F. as his soli-
citor from
1855 to 1859,
and became
indebted to
him for costs
and cash ad-
vances. In
July, 1858,

W. gave to *F.* a security upon his furniture, farming stock, &c., to secure all monies due or to become due, with an immediate power of sale. In *January, 1859*, *F.* sent in to *W.* an unsigned bill of costs and cash account, and in *March* pressed for payment and threatened to enforce his security. *W.* then employed another solicitor, and a correspondence went on till *May*. *F.*, on 17 *May*, gave notice that if the money was not paid on that day he should take possession under his security, and he accordingly did so. *W.* then paid the amount under protest. The bill of costs contained items to a considerable amount subsequent in date to the security, and overcharges were shown. Many of the vouchers for the items in the cash account, though applied for, had not been produced till the day of payment. Held, that *W.* was entitled to an order for taxation.

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Petitioner being indebted to Mr. *Foster* in a considerable amount for professional business transacted for him and cash advances made to him, a deed dated the 2nd of *July*, 1858, was executed, by which, after reciting that the Petitioner was indebted to Mr. *Foster* in various sums lent and paid for his use, and for costs and charges for business done, the Petitioner assigned to Mr. *Foster* all his farming stock, alive and dead, corn, and growing crops and produce, and all his household goods, chattels and effects at *Taversham*, and all his race-horses, &c., subject to a proviso for making the deed void if the Petitioner should pay to Mr. *Foster*, his executors, administrators or assigns, the sums of money then due, and all such further sums as Mr. *Foster* might advance, on the 2nd of *December*, 1858, or on such earlier day as Mr. *Foster* might by notice in writing appoint, and should in the meantime pay interest at the rate of 5*l.* per cent. per annum. The deed contained a power of sale enabling Mr. *Foster* to sell immediately on default in payment. Three other securities of the same date were given, but it is not necessary to state any particulars as to them.

In *January*, 1859, Mr. *Foster* delivered an unsigned bill of costs, which, after deducting sums received for costs from other persons, showed a balance of 362*l.* 0*s.* 1*d.* due from Mr. *Walker*, its amount apart from these deductions being 479*l.* 9*s.* 4*d.* The sum claimed by Mr. *Foster* as due, including the above bill of costs, was 2,190*l.* 3*s.* 4*d.* The Petitioner, as it appeared, was in somewhat embarrassed circumstances, and on the 15th of *March* Mr. *Foster* pressed him for payment of the costs and cash advances, and threatened to put the securities in force, upon which he consulted Mr. *Hall*, another solicitor. Several interviews took place between Mr. *Hall* and Mr. *Foster*, and a correspondence ensued between

tween them, in the course of which the following letters passed.

On *Friday*, the 13th of *May*, 1859, Mr. *Hall* wrote to Mr. *Foster* as follows :—

“ I regret that you should have refused to show me the residue of the vouchers for monies advanced by you on Mr. *Walker's* behalf; I beg to repeat what I said to you this morning, that my client is anxious to pay what is due to you. The matter most in dispute is your bill of costs, some items of which appear too high; however, I think this difficulty might be overcome, if, instead of your refusing to take a farthing off, you and I met and taxed it between ourselves.”

Mr. *Foster*, on the same day, answered the above letter as follows :—

“ You appear to be under a mistake. I did not refuse to show the vouchers, provided you are ready to pay the amounts due, as to which I cannot obtain any positive engagement. If you will send me the drafts of the proposed transfers, so that I may see there is a serious intention of completing the business, the vouchers shall be produced on any appointment for settlement being made. I had rather my bills, if taxed, should be so by the proper officials, and thereby any unpleasant discussion between you and myself will be avoided. Unless the drafts are sent to me in the course of *Monday*, I shall assume that it is not your intention to complete the business, and shall issue execution, or take such other steps as I may think necessary to bring the matter to a close.”

Mr. *Hall*, on the 14th of *May*, replied as follows :—

“ An appointment is made after I receive abstract of securities you hold against Mr. *Walker* (which are given for

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for no specific sum, but for money due at the time of the execution and thereafter to become due) to compare abstracts, and also to examine debtor and creditor accounts with the vouchers, but when the account is gone into not one-half of the vouchers are produced. On *Friday* morning your clerk called at my office and informed me that the remainder of the vouchers were found, and I at once made an appointment to examine them, and attended; but, to my no little surprise, I again repeat, you declined to produce the vouchers, although I informed you that my client was ready to pay you off at any time, and that the chief difficulty in the way was your bill of costs, which I proposed to tax between ourselves. . . . I again recapitulate that my client and his friends are most anxious to pay what is really due to you, and that at once. It is useless to send the draft transfers for your perusal until the amount due to you is ascertained, and the time is too short to allow me to draw them."

No reply was sent to this letter.

Mr. *Foster* deposed positively, and the statement was not contradicted, that, until the 13th of *May*, no objection was made to any charges in his bill of costs, though the bill of costs had been in Mr. *Hall's* hands nearly two months.

On the 17th of *May*, Mr. *Foster* served on the Petitioner a written notice, in these terms:—

"I do hereby give you notice, that I appoint the hour of twelve o'clock at noon this day for payment of the principal monies and interest due to me by virtue of an indenture expressed to be made on the 2nd of *July* last between yourself of the one part and myself of the other part. As witness my hand the 17th day of *May*, 1859.

"Edmond Foster."

The

The payment was not made; and Mr. *Foster*, on the same day, sent a person to take possession on his behalf of the property comprised in his security, and which, up to the time of such seizure, was in the actual possession of the Petitioner, who was in the occupation of the house and land where the assigned property was situate.

On the 19th of *May*, in order to prevent Mr. *Foster* from exercising his power of sale, the Petitioner prevailed upon a Mr. *Elliston* to pay under protest the amount of Mr. *Foster's* claim. A second bill of costs amounting to *20l. 6s. 4d.* was delivered on this day, and Mr. *Elliston* paid under protest the total amount of the *2,190l. 3s. 4d.*, with subsequent interest, and the second bill of costs, amounting in the whole to *2,233l. 18s. 2d.* Mr. *Foster* signed upon one of the deeds a receipt in these terms:—“ I hereby acknowledge that *B. A. Elliston*, of &c., has this day paid me the sum of *2,233l. 18s. 2d.* for the amount due on the within securities, and I hereby undertake to assign the within mentioned securities to him at his cost when thereto required.”

The Petitioner then presented a petition for taxation of the bill of costs, alleging a number of specific instances of overcharge. The Court considered that there was sufficient evidence of there being overcharges, though not of a gross nature.

Vice-Chancellor *Wood* dismissed the petition without costs, being of opinion, that, under the circumstances, there had not been any pressure of such a description as to lay a ground for ordering a taxation of the bills after payment.

Mr. *W. D. Lewis* and Mr. *Edmund James* for the Petitioner.

The Respondent had a security not only for what was due,

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due but for what was to become due, and he has taken upon himself to determine how much was due, and has made use of the extensive powers given him by his security to enforce immediate payment of that amount as fixed by himself. It is like the case of a mortgagee's solicitor requiring payment of his bill of costs and deducting it from the mortgage money, which is a case in which if there are overcharges the Court will order taxation after payment; *Lawless v. Mansfield* (*a*). The powers given by the security were such as to make the payment substantially the act of the solicitor, not of the client, who was placed in such circumstances that he could not help himself, for, if he had not paid, the Respondent would have sold and paid himself. Here the letters which passed before the payment amount to an arrangement that the bill should be taxed, and the Court will attend to such arrangements. *Re Fisher* (*b*); *Ex parte Wilkinson* (*c*). The security purported to extend to future costs and some of the costs paid were incurred after its date. As regarded these costs the security was not legal, and it was an illegal act to make use of it to enforce payment of them. Overcharges being clearly shown the Petitioner under the circumstances is entitled to taxation.

Re Cattlin (*d*); *Re Stephen* (*e*); *Re Browne* (*f*); and *Howell v. Edmunds* (*g*); were also referred to.

Mr. *Rolt* and Mr. *Cole*, for the Respondent.

The Appellant alleges that this is a case in which in substance the solicitor received his client's money and paid himself out of it, but that is not a just view of the facts.

(*a*) 1 *Dru. & War.* 557.

(*e*) 2 *Phill.* 562.

(*b*) 18 *Beav.* 183.

(*f*) 1 *De G., M. & G.* 322.

(*c*) 2 *Coll.* 92.

(*g*) 4 *Russ.* 67.

(*d*) 23 *Beav.* 412.

facts. It is merely a case in which a solicitor took measures to enforce payment of his bill of costs some months after the relation of solicitor and client had ceased, the client being represented in the transactions by a new solicitor, and so having all requisite protection and advice. The security purported to extend to future costs; it was no doubt invalid as to them, but the subsequent costs were due whether on security or not, and there was nothing unreasonable in requiring payment. Mere pressure is not enough to make a bill taxable after payment, there must be undue or illegal pressure; if a client is in difficulties there must always be pressure to obtain payment of a bill; *Re Barrow* (*a*). As to the allegation of a contract that the bill should be taxed, the petition makes no such case, the Respondent's reference to taxation was made before payment, and the protest made at the time of payment negatives the existence of a contract. The Appellant does not show either undue pressure and overcharges, or overcharges amounting to fraud, and he is bound to show one or the other. The cases in which the relation of solicitor and client had not ceased cannot help the Appellant, this makes *Lawless v. Mansfield* and *Howell v. Edmunds* inapplicable. In the case of *Re Wilkinson* the bill was delivered on the eve of settlement, here months before; *Re Harrison* (*b*); *Re Hubbard* (*c*); *Re Browne* (*d*). The case of pressure breaks down. *Foster* had given notice in *March* that he would put his security in force, the bill having been delivered in *January*; the Petitioner in *March* retained *Hall*, and for two months after this no complaint was made of the amount of charges. There are, no doubt, some overcharges in the bill, but in the absence of undue pressure their existence is immaterial for the present purpose,

(*a*) 17 *Beav.* 547.

(*b*) 10 *Beav.* 57.

(*c*) 15 *Beav.* 251.

(*d*) 1 *De G., M. & G.* 322.

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purpose, they being trifling in amount, and no attempt having been made to show gross overcharge amounting to fraud.

Mr. Lewis in reply.

It is wholly immaterial whether the pressure was justifiable or not, the question is, whether there was such pressure as to oblige the client to pay at once without a previous taxation, and a stronger case of pressure than the present can hardly be imagined. As to the relation of solicitor and client having ceased for some time, that is not of great importance; many of the cases in which taxation after payment has been ordered have been cases where the relation of solicitor and client had never existed at all; as when a mortgagor applies to tax the bill of the mortgagee's solicitor. Here is an account to be settled; if the petition is dismissed the Petitioner will have to file a bill, where is the use of driving him to that course? If the Petitioner had filed a bill on the 18th of *May*, for an account of what was due on the securities, an injunction would have been of course. It may be doubted whether the security was good even as to past costs, no amount being specified; it clearly was not good as to the future costs; no signed bill had been delivered, the Respondent, therefore, was not in a position to sue at law, and so what he has done is to compel payment of a sum for which he could not have brought an action, by means of a security which did not cover the whole of that sum. The Act lays down as a general rule that there shall not be taxation after payment, but it never intended by payment a payment made under such circumstances as here, where the client was obliged to pay at once under pain of being turned out of house and home.

Re Tryon(a) and *Re Rance*(b), were also referred to.

The

(a) 7 *Beav.* 496.

(b) 22 *Beav.* 177.

The LORD JUSTICE KNIGHT BRUCE.

Mr. *Walker*, the Petitioner in this case, a farmer in *Cambridgeshire*, of some landed property, with means not inconsiderable, but addicted either to racing or to breeding race-horses, and not unembarrassed, employed Mr. *Foster*, the Respondent, a solicitor in *Cambridge*, professionally. Independently, however, of the professional relation between them, there was also the relation of debtor and creditor otherwise, by reason of frequent advances which the client required, and which the solicitor made to or for him. And in the course of the connexion between them, Mr. *Foster* prepared, and caused or procured Mr. *Walker* to execute, three or four securities upon freehold and copyhold estates belonging to Mr. *Walker*, (freehold and copyhold property which had been previously mortgaged); upon a judgment which had been obtained against a dragoon officer, who had bought a horse of Mr. *Walker*, in respect of that horse; and also upon all the moveable property of Mr. *Walker*, on his farm, live and dead stock and furniture, and everything of that description present at that time and to come, as I understand the matter. And these securities, limited only by the amount of the stamps upon them, were not for any specified amount of debt, but recited generally that a debt was due, and were securities for the debt then due, with interest, whatever it might be, and all debts thereafter to become due on any account whatsoever—(that I believe is the expression in two or three of the securities), with the interest also on those future debts. These securities, which were extensive and stringent in their frame, were obtained in *July*, 1858. Some time afterwards the solicitor, the creditor, desired payment: he was more ready to receive than the debtor was to pay; and, in the course of the discussions that ensued, a bill of costs was delivered, accompanied by

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an account current. The bill of costs amounted to  $479l. 9s. 4d.$ , reduced by sums credited as received on the client's account to  $362l. 0s. 1d.$  This was independent of the debt for advances and interest, which considerably exceeded that sum. The bill having thus been delivered, the client employed another solicitor, between whom and Mr. *Foster* negotiations ensued; Mr. *Foster* pressing for payment and threatening to make his securities available, and the other desiring time. In the course of these negotiations the propriety of looking at the bill delivered, with a view to moderating its amount, was suggested to Mr. *Foster*, who, however, declined to allow such an examination, stating that, if it was to be examined, it must be examined regularly by means of taxation; his vouchers, rather extensive, and, as far as I can judge, relating to not very simple pecuniary accounts, were asked for, but were not produced; Mr. *Foster* saying, in substance, that it would be time enough to produce the vouchers when the money should be ready. Matters went on in this way, the client being in possession of the bill from *January*, 1859, when it was delivered—a bill, however, unsigned, and, therefore, one upon which no action could be maintained, although the want of signature did not prevent the client from having it taxed if so disposed. Mr. *Foster*, dissatisfied with the delay, and reasonably or unreasonably dissatisfied with the manner in which he considered himself treated, in *May*, 1859, put one of his securities in force; and that security was a bill of sale, which enabled him to send a bailiff to take possession, or some person exercising those functions to take possession, and he accordingly did take possession, of all the moveable property (stock, crops and effects of that kind) upon the farm—of course a very serious step. Not only did the terms of Mr. *Foster's* security enable him to do that, but they enabled him also to sell at once. Of course this was,

was, whether just or unjust, a case of considerable pressure upon a man circumstanced as Mr. *Walker* was. Accordingly, when matters had arrived at this state, his brother-in-law, I think, Mr. *Elliston*, a neighbouring yeoman or gentleman, was induced to advance for Mr. *Walker* the sum requisite to pay Mr. *Foster's* demand in full, which was a sum for principal and interest exceeding £,000*l.* Now that payment was obtained clearly by means of the pressure, just or unjust, fair or unfair, of having put the bailiff in possession of the stock and goods, as I have said; and the demand was in one entire sum for the principal and interest claimed, and perhaps fairly claimed, independently of the costs, and for the amount of the costs. Now, Mr. *Foster's* objection to deliver the vouchers before payment had continued down to the very day of payment; the vouchers for the money account were not produced, as I understand the facts, until the day, namely, the 19th of *May*, I think, when the payment was made, when there could hardly be time for a prolonged or careful consideration of them. That, however, is not all. The bill of costs included in this amount of £,000*l.* and upwards comprised items, of no inconsiderable amount, of dates subsequent to the securities, namely, subsequent to the 2nd of *July*, 1858, when the securities were given. It was not competent, as I understand the law, for the solicitor to take a security, or to apply a security taken, for the purpose of costs which might be incurred at a later period. But the security was applied and enforced for that purpose as well as the rest, and the whole was treated as one entire demand for which the solicitor had entitled himself to sell the farmer's stock, and crops, and furniture. When to this it is added that the client had never professed to abandon his intention of having the correct amount due for costs ascertained, I find it impossible to say that this was such a payment as precluded him from a tax-

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ation. I think that it was a payment made under such special circumstances as to bring the case within the exception of the statute. The payment, I conceive, cannot be alleged against the taxation, and there is nothing else to allege against it. It was possibly necessary that the petition should allege overcharge, and my opinion is, that there is for the present purpose sufficient evidence of overcharge, that is, sufficient evidence of probability, at least, that on taxation the bill will be considerably diminished—an observation which I do not mean at all as one reflecting upon Mr. *Foster*. Not only may the bill be too high without any imputation upon his character, but before the Taxing Officer evidence may possibly be adduced to displace or meet much of that which is now before us, and which, as I have said, in my judgment raises a *prima facie* case of liability to deduction upon a taxation to a considerable amount. The greater bill then must, I think, be taxed. The amount of the second bill is rather less than twenty guineas, and perhaps it is, therefore, of very slight importance whether it shall be taxed or not; but that bill was delivered so very late, and is so much connected with the other, that the one being taxed the other ought, in my opinion, to be so likewise. Differing, I acknowledge, from an opinion which it is impossible not to estimate very highly, and respect very greatly, I think that both these bills should be taxed under an order of the usual kind for that purpose.

The LORD JUSTICE TURNER.

I am also of opinion, with the most unfeigned respect to the Vice-Chancellor, whose great attention to all cases which come under his consideration, and whose elaborate judgment upon this case, render it a not very pleasing duty to differ in opinion from him, that this order

order, dismissing the application to tax this bill of costs, cannot be maintained. I certainly am not more inclined than the Vice-Chancellor himself is to encourage applications of this description; and still less am I inclined to disturb any settled rules upon the subject. But in differing from him in this particular case, I rather think that I am adhering more to the general rules which have been laid down upon the point than his Honor himself has done. I collect from the cases upon this subject, that the general rule is now considered as perfectly well settled, that upon an application to tax a bill of costs which has been paid, it must be shown either that there has been what is called undue pressure and overcharge, or that there has been overcharge amounting to fraud; and, in my opinion, this case is brought within the first branch of that rule—undue pressure and overcharge. The case is peculiar in its circumstances; and I am not aware of any case—and certainly none has been cited at the bar—which resembles it or can govern the decision. It is the case of a security taken by a solicitor for monies due and to become due to him. That, as I think, is the operation of the deed. The question then is, whether there has been pressure in enforcing the security? for if there has been pressure in enforcing the security, there has been pressure in enforcing payment of the bill. Now this is a mixed case of objections to the account with respect to the monies advanced upon the security and objections to the bills of costs. As to the account of the monies which have been advanced upon the security the objection is this:—that no vouchers had been produced. As to the bill of costs the objection is, that the charges are high and unreasonable; and in that state of circumstances, the bill having been delivered in *January*, 1859, and having been the subject of discussion between the parties, Mr. *Foster*, on the 13th of *May*, 1859, writes this letter to Mr. *Hall*, who at that time had

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had become the solicitor of the petitioner. He says:— “ You appear to be under a mistake. I did not refuse to show the vouchers provided you are ready to pay the amounts due, as to which I cannot obtain any positive engagement. If you will send me the drafts of the proposed transfers, so that I can see there is a serious intention of completing the business, the vouchers shall be produced on any appointment for settlement being made. I had rather my bills, if taxed, should be so by the proper officials, and thereby any unpleasant discussions between you and myself will be avoided.” That refers to a proposition which Mr. *Hall* had made that they should meet and settle the questions upon the bill of costs between themselves. Mr. *Foster* then continues:— “ Unless the drafts are sent to me in the course of *Monday*, I shall assume that it is not your intention to complete the business, and shall issue execution, or take such other steps as I may think necessary to bring the matter to a close;” threatening, no doubt, to issue execution on the securities, but saying in the alternative that he would take either that course of issuing execution, or such other proceedings as he might think necessary to bring the matter to a close. On the following day, the 14th of *May*, Mr. *Hall* answers that letter. He refers again to the non-production of the vouchers; and he says, “ I again repeat, you declined to produce the vouchers, although I informed you that my client was ready to pay you off at any time, and that the chief difficulty in the way was your bill of costs, which I proposed to tax between ourselves, but from which you stated positively that you would not take off one farthing. I again recapitulate that my client and his friends are most anxious to pay what is really due to you, and that at once; it is useless to send the draft transfers for your perusal till the amount due to you is ascertained, and the time is too short to allow me to draw them.” The letter

letter of the 13th was written on the *Friday*; *Monday* was the day fixed for the delivery of the drafts of the transfers, and on the *Saturday* that letter was written by Mr. *Hall*. Without more, and without further communication, on the 17th, the *Tuesday*, the day after the day fixed by the letter of the 13th of *May*, Mr. *Foster* gives immediate notice that the money which was due upon the securities must be paid at twelve o'clock on that same day; and the money not being paid upon that day, he issues execution and takes possession under the bill of sale which he had of all the moveable chattels of this gentleman. Now was or was not Mr. *Hall* right in asking for the production of those vouchers before the money was paid? If he was right, might he not very reasonably expect that Mr. *Foster* would produce those vouchers before he insisted upon the settlement of the accounts, and that he would not resort to that extreme alternative, which was stated in his letter, of putting in force his security without further notice? I think that he was justified in that expectation. I think that it was Mr. *Foster's* duty, if he intended to enforce the security, to say at once, "you must procure an order to tax this bill to-morrow" (because that was the only day that was left), "or I will put my security in force on *Tuesday*." I think that he was justified in considering that Mr. *Foster* in the letter of the 13th of *May* had left an alternative open, that he would not proceed to enforce the security and take to himself full payment, and constitute himself the judge of the amount which was due upon the security. If so, I think that there was surprise and pressure on the part of Mr. *Foster* in putting in force this security as he did. As to over-charges there is no doubt; one item in this bill has been proved beyond question to be an over-charge, and that, according to the cases which have been cited at the bar, is sufficient, with the undue pressure,

1860.
In re
FOSTER.
Ex parte
WALKER.

1860.

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In re  
**FOSTER.**

**Ex parte  
WALKER.**

pressure, to entitle the party aggrieved to the taxation of the bills.

Now, it is said that this gentleman had an independent solicitor. Mr. *Hall*, it appears, had become his solicitor in the month of *March*, 1859, and it is very true that the principles which apply to the taxation of a bill where a party is without protection, do not apply so strongly to the case where the bill has been delivered and the party has a solicitor of his own to protect him. But then that question has to be considered with reference to the conduct of the solicitor who has afforded that protection; and Mr. *Hall*, the solicitor who protected Mr. *Walker* the Petitioner, himself objected to this bill of costs, and that objection was known to Mr. *Foster*, the solicitor against whom the taxation is applied for. It is said that Mr. *Hall* did not do this for two months; that he had had possession of the bill of costs from *March* to *May* without raising any objection to it. But this fact could not have precluded taxation before payment. It could not, of course, be for one moment argued, that the fact of Mr. *Hall* having had the bill of costs for two months could have precluded the taxation before payment; and, in my judgment, it cannot preclude the taxation after payment, if the payment was enforced, as I think it was, by pressure. I think, too, it is not immaterial, by any means, to the question in the present case, that the security was for the payment of future bills of costs. It was put by Mr. *Rolt* and Mr. *Cole* in argument, that the sole question to be considered is, whether the costs were due independent of the security. But, upon the question of pressure, Mr. *Foster* had undoubtedly no right to take payment under his security of the bill of costs, so far as the costs had been incurred subsequently to the execution of the deed: he had no right to demand immediate payment of that part of his bills of costs which had been incurred

incurred subsequently to the security, for he had delivered no signed bill of costs. He therefore was not in a position to enforce payment at all of those costs which had been incurred subsequently to the execution of the deed; he could not enforce it under the deed, because the deed was invalid as a security for future costs; he could not enforce it independently of the deed, because he had delivered no signed bill of costs. Then was it not pressure if he has availed himself of the power given to him by this security, to enforce payment of money of which he had no right to enforce immediate payment either by virtue of the security or otherwise? I think that it was, and I am of opinion that the order of the Vice-Chancellor must be discharged, and that there must be a reference to tax the two bills of costs.

1860.  
In re  
FOSTER.  
Ex parte  
WALKER.

In the Matter of ELIZABETH GREEN, Widow; and  
In the Matter of "AN ACT TO FURTHER AMEND THE  
LAW OF PROPERTY AND TO RELIEVE TRUSTEES;"  
and  
Of the Trusts of the Will of ELIZABETH GREEN.

THIS was a petition presented by the executors of *Elizabeth Green*, widow, to obtain the opinion or direction of the Court as to whether any fund should be set apart to meet contingent liabilities in respect of a leasehold which formed part of the estate of the testatrix.

The  
indemnify the vendor against the covenants of the lease. He bequeathed the leasehold to his widow and appointed her his executrix:—*Held*, that the act applied, and that the executors of the widow were at liberty to distribute her estate without setting apart any fund to provide against the liability under the covenants.

*June 8.*  
Before The  
LORDS JUS-  
TICES.

On the sale of  
a leasehold  
before the  
passing of the  
act 22 & 23  
Vict. c. 35,

the purchaser  
covenanted to

1860.

In re  
GREEN.

The property in question was a house held under a lease granted by the Commissioners of *Greenwich Hospital* to *John Bacon*, a plasterer, for a term of sixty-three years, from 24th *June*, 1827, at a yearly rent of 20*l.* 10*s.* The lease contained covenants to pay the rent and keep the property in repair.

*Bacon* having subsequently become bankrupt, the assignees sold the lease to *James Green*, the husband of the testatrix, and the property was assigned to him by an indenture dated the 14th of *January*, 1835. The deed of assignment contained a covenant by *Green* to indemnify both the assignees and *Bacon* himself from the rent and covenants.

*Green* died in 1836 leaving a will, by which he bequeathed this leasehold to his wife, and appointed her sole executrix.

The testatrix died in *November*, 1858. Her executors proved her will; and, on the 30th of *September*, 1859, assigned the leasehold to a purchaser. They also got in and converted the other property of the testatrix, and had now a large balance in hand ready for distribution among the residuary legatees.

By an order made by Vice-Chancellor *Stuart* on 5th *March*, 1860, it was ordered that an account should be taken of the debts and liabilities affecting the personal estate of the testatrix, and that debts were to be distinguished from liabilities, and liabilities certain from liabilities contingent, and that the personal estate of the testatrix should be applied in payment and satisfaction of such debts and liabilities in a due course of administration.

The

The Chief Clerk certified on 9th *May*, 1860, that no person had come in and proved any debt against the estate; that the time fixed by advertisement for that purpose had expired, and that there was a contingent liability in respect of the covenant of *James Green* contained in the assignment of 14th *January*, 1835.

1860.

In re  
GREEN.

The executors then presented this petition asking the opinion of the Court whether the Petitioners were personally liable in respect of any further claim under the covenants in the lease and assignment, or either of them; and that, if so, then a sufficient fund might be directed to be set apart for answering such liability. Vice-Chancellor *Stuart* recommended that the petition should be mentioned to the Lords Justices.

**Mr. Bacon** and **Mr. Bonham Carter** for the executors.

The Vice-Chancellor was of opinion that the case was within 22 & 23 Vict. c. 35, s. 27 ("An Act to further amend the Law of Property and to relieve Trustees"), and that by virtue of that enactment the executors might distribute the estate without setting apart any fund to answer this contingent liability, but His Honor recommended us to come here, because in the case of *Dodson v. Sammell* (a), Vice-Chancellor *Kindersley* decided that the section in question did not apply in the case of liabilities under instruments executed before the passing of the act, being of opinion, on the authority of *Moon v. Durden* (b), that the section was not to be treated as having any retrospective effect.

**Mr. Ellis** for the residuary legatees.

Their LORDSHIPS held that the case was within the act, and made an order stating the opinion of the Court that

(a) 8 *Weekly Rep.* 252.

(b) 2 *Erch.* 22.

1860.

—  
In re  
GREEN.

that the executors were at liberty to proceed in the distribution of the estate of the testatrix without retaining or setting apart any funds for the purpose of providing against any liability in respect of the covenants in the indenture of 14th *January*, 1835, and directing that the executors should be at liberty to proceed in the distribution of the estate accordingly.



**In the Matter of JAMES BURKE, a Person of unsound mind; and**

**In the Matter of "THE ACT FOR BETTER SECURING TRUST FUNDS, AND FOR THE RELIEF OF TRUSTEES;" and**

**In the Matter of the Trusts of the Will of NATHANIEL SNELL.**

*June 8.  
Before The  
LORDS JUS-  
TICES.*

Order made for the application of the income of a fund in Court for the maintenance of a person of unsound mind, without commission, though his property produced upwards of 200*l.* per annum.

THIS was the petition of a person of unsound mind, by his brother, as his next friend, asking that the income of a sum of 4,446*l.* 6*s.* 11*d.* Consols, which had been paid into Court under the Trustee Relief Act to his account, might be paid to his brother and sister, they undertaking to maintain him.

The lunatic was twenty-nine years of age and resided with his brother and sister. His lunacy was clearly shown, but no commission of lunacy had ever been issued. His property consisted of the above-mentioned sum of consols—the sum of 974*l.* 7*s.* 2*d.* Reduced Bank Annuities—one-third part of a sum of 3,120*l.* 5*s.* 3*d.* consols, subject to a deduction for costs, and one-third share of a small landed property producing 100*l.* a-year. His income thus amounted to more than 200*l.* a-year, all arising from property to which he was absolutely entitled.

Mr.

**Mr. Eddis**, for the Petitioner, called the attention of the Court to the amount of the lunatic's property.

1860.

—  
In re  
BURKE.

**Mr. Phillips** appeared for the Respondents.

Their LORDSHIPS, after remarking that the whole income was below 300*l.* per annum, made an order for payment of the income of the 4,446*l.* 6*s.* 11*d.* Consols to the brother and sister during such period as the lunatic should reside with them, or until further order, they undertaking not to receive any dividends after the lunatic's ceasing to reside with them, and also undertaking to apply for his maintenance and support the dividends they should receive.

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NOTE.—See *Eyre v. Wake*, 4 *Ves.* 795; *Gillbee v. Gillbee*, 1 *Phill.* 121; *Re Irby*, 17 *Beav.* 334.

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In the Matter of ELLEN TAYLER, a Person of unsound mind ; and

In the Matter of the Trusts of the Annuity of ELLEN TAYLER ; and

In the Matter of the TRUSTEE ACT, 1850.

THE Petitioner, *Ellen Tayler*, was a person of unsound mind, but had never been found so by inquisition, as she had not property sufficient to pay the expenses of a commission. In 1823 she was placed in a lunatic asylum, where she had ever since remained.

On the 19th of October, 1831, *J. N. Tayler* granted by deed to *John Slade*, his executors, administrators and assigns, two annuities of 40*l.* each, issuing out of certain lands, in trust for *Ellen Tayler* and another person since deceased, for their respective lives; and by the same deed

1861.  
24 July.  
Before The  
LORDS JUS-  
TICES.

An order can-  
not be made  
for the main-  
tenance of a  
lunatic not  
found so by  
inquisition,  
unless pro-  
ceedings have  
been taken for  
placing the  
property under  
the administra-  
tion of the  
Court of  
Chancery.

1861.

In re  
TAYLER.

deed he granted the lands to *Slade* in fee, upon trust for better securing the annuities, and subject thereto for the grantor in fee.

*Slade* during his life received Miss *Tayler's* annuity, and applied it for her maintenance. He died intestate in 1855, and from that time the annuity had not been received.

Dr. *Finch*, who had succeeded to the management of the asylum in 1858, continued to maintain Miss *Tayler* there, though for some years he had received no payment whatever for her maintenance, and there was due to him an arrear of 485*l.* She had no relatives who in any way interested themselves about her.

Under these circumstances this petition was presented by Miss *Tayler* by Dr. *Finch* as her next friend, praying firstly, that Dr. *Finch* might be appointed the trustee of the deed of 1831 in the room of *Slade*, and that an order might be made vesting the annuity, arrears, and right to sue, and the lands, in him. And secondly, that he might be authorized to retain the arrears of the annuity when recovered (after paying the costs of the petition) on account and in part satisfaction of the arrears due to him, and also to apply the future payments of the annuity for the Petitioner's future maintenance.

Mr. *Hardy* appeared in support of the petition.

[*The LORD JUSTICE TURNER.* Have we jurisdiction to give such directions as are asked by the second paragraph of the prayer.]

Mr. *Hardy* referred to *Re Burke* (*a*).

*The*

(*a*) *Supra*, p. 124.

*The LORD JUSTICE TURNER.*

We have given such directions where the petition was in a suit as well as in lunacy, and the case to which you refer stands on the same footing, the fund having there been paid into Court under the Act for the relief of trustees. But I am of opinion, that we have no jurisdiction to give any direction as to the property of a person not found lunatic by inquisition, except in cases where it is under the administration of the Court of Chancery. In the present case we can go no further than to make an order appointing Dr. *Finch* trustee, and vesting in him the annuity, arrears and right to sue, and all the estate which was vested in *Slade*. He can then enforce payment of the arrears and future instalments of the annuity, but we cannot make any order as to his application of them. The proposed mode of dealing with them appears very proper, but we have no jurisdiction to make an order authorizing it.

1861.  
In re  
TAYLER.

*The LORD JUSTICE KNIGHT BRUCE concurred.*



1860.

*June 1, 9.*  
 Before The  
*Lord*  
*Chancellor*  
*LORD*  
*CAMPBELL*  
 and The  
*LORDS JUS-*  
*TICES.*

A testator gave his real and personal estate upon trust as to the income for his brothers *E.* and *C.* or the heirs of their bodies, and declared that if either brother should die leaving heirs of his body, then the share of such brother should descend to such heirs, but if one brother should die without lawful issue then the whole income should be paid to the surviving brother, or in case of his death also to his lawfully begotten heirs; but in case both brothers should demise without issue lawfully begotten, then the whole property should be divided among the testator's nearest of kin. And the testator appointed executors, with power to appoint other executors, as to them might seem fit, also with full power to get in and receive all monies or securities for money, and to sell, dispose of and convert into money all other his real and personal estate either by public auction or private contract, as to them should seem meet.

*Held*, affirming the decision of Vice-Chancellor *Stuart*, that there was an effectual gift over of the personality to the next of kin in the event of *E.* and *C.* dying without leaving issue at their respective deceases.

*Per* the Lord Chancellor. Whether the 29th section of the Wills Act (7 Will. 4 & 1 Vict. c. 26) applies in the case of a gift over of personality which is included along with realty in a preceding gift which creates, without implication from the gift over, an estate tail in the realty, *quere*.

*Held*, reversing the decision of the Vice-Chancellor, that there was no conversion of the real estate into personality from the death of the testator.

*Held* also, that the brothers took the real estates as tenants in common in tail, with cross remainders in tail, with remainder to the next of kin in fee.

### GREENWAY v. GREENWAY.

THIS appeal raised several questions on the construction of the will of *George Sullivan Greenway*, dated the 1st of *March*, 1850, which was as follows:—

“ I do hereby bequeath all my property real and personal, of whatsoever nature or description, and wheresoever situate (whether land at *Heidelberg*, *Port Philip*, in *New South Wales*, or in the *Jaffna Peninsula of the Island of Ceylon*, or funds in the hands of Messrs. *Allan, Deffell & Co.*, of *Calcutta*, or of Messrs. *Arbuthnot & Co.*, of *Madras*, or of Mr. *Kelynge Greenway*, of *Warwick*, in *England*, or elsewhere), to the members constituting the firm of Messrs. *Arbuthnot & Co.*, of *Madras*.

“ In trust for the benefit in equal portions, to the extent

descend to such heirs, but if one brother should die without lawful issue then the whole income should be paid to the surviving brother, or in case of his death also to his lawfully begotten heirs; but in case both brothers should demise without issue lawfully begotten, then the whole property should be divided among the testator's nearest of kin. And the testator appointed executors, with power to appoint other executors, as to them might seem fit, also with full power to get in and receive all monies or securities for money, and to sell, dispose of and convert into money all other his real and personal estate either by public auction or private contract, as to them should seem meet.

*Held*, affirming the decision of Vice-Chancellor *Stuart*, that there was an effectual gift over of the personality to the next of kin in the event of *E.* and *C.* dying without leaving issue at their respective deceases.

*Per* the Lord Chancellor. Whether the 29th section of the Wills Act (7 Will. 4 & 1 Vict. c. 26) applies in the case of a gift over of personality which is included along with realty in a preceding gift which creates, without implication from the gift over, an estate tail in the realty, *quere*.

*Held*, reversing the decision of the Vice-Chancellor, that there was no conversion of the real estate into personality from the death of the testator.

*Held* also, that the brothers took the real estates as tenants in common in tail, with cross remainders in tail, with remainder to the next of kin in fee.

tent of the annual income of my property of my brothers *Edward Kelynge Greenway* and *Charles Thomas Greenway*, or the heirs of their bodies lawfully begotten, and the meaning of this my will is, that if either brother shall die leaving lawfully begotten heirs of his body, then shall the share or portion of such brother descend to such lawfully begotten heirs; but if one brother shall die without lawful issue, then shall the whole annual income be paid to the surviving brother, or, in case of his death also to his lawfully begotten heirs; but in case both brothers shall demise without issue lawfully begotten,—

“Then shall the whole property be divided equally amongst my nearest of kin; and I direct and desire that my god-daughter *Isabella*, daughter of *E. H. Woodcock*, formerly of the *Madras Civil Service*, esquire, be allowed to do and come in as a co-sharer on the same footing with my nearest of kin.

“And I do hereby nominate and appoint *Wm. MacTaggart*, esquire, and *Wm. Urquhart Arbuthnot*, esquire, both of *Madras*, executors of this my will, with power to nominate and appoint other executors as to them may seem fit, also with full power to get in, collect and receive all monies or securities for money, and to sell, dispose of and convert into money all other my real and personal estate, either by public auction or by private contract, as to my said executors shall seem meet.”

Then followed a clause allowing the executors their expenses in carrying into execution the trusts of the will.

The testator died in 1857, leaving *Edward Kelynge Greenway* his heir-at-law, and *Edward Kelynge Greenway*, *Charles Thomas Greenway* and *Isabella Thomas* his next of kin. The executors disclaimed, and admi-

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*GREENWAY*  
 v.  
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GREENWAY.

nistration with the will annexed was granted to *Edward Kelynge Greenway*.

Vice-Chancellor *Stuart*, by decree dated the 10th of *February*, 1859, declared that the gift over of the personal estate to the next of kin was not void as a gift over on an indefinite failure of issue (*a*); and at the hearing for further consideration on the 17th of *January*, 1860, his Honor decided that the will effected a conversion of the real estate, and that the proceeds of the sale were to go along with the personality. The order accordingly directed the real estate to be sold, the purchase-money to be brought into Court and invested, and the income to be paid to *Edward Kelynge Greenway* and *Charles Thomas Greenway* in moieties during their joint lives, with liberty to apply on the death of either. The testator's brothers appealed against both these orders.

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Mr. *Malins* and Mr. *Cole* for the Appellants.

We contend, as to the real estate, that there is no conversion, but that it is given to the two brothers as tenants in common in tail, with cross remainders between them in tail, with remainder to the next of kin of the testator at the time of his death. As to the personality, we contend that the gift, being one which creates an estate tail in realty, is an absolute gift of the personality.

If the will had stopped short before the clause appointing executors, it is clear that there would be an estate tail in the realty, but it has been decided that the final clause effects a conversion. This we contend is erroneous: to effect a conversion there must be an imperative

(*a*) 1 *Giff.* 131.

perative direction to sell: here there is a power to sell, but no direction to sell, and no purpose requiring a sale. The cases on the subject are collected in *White and Tudor's Leading Cases* (a), and it appears from them, that where there is merely a discretionary power to sell, the property retains its original character unless and until a sale is made; *Polley v. Seymour* (b); *Bourne v. Bourne* (c); *Davis v. Goodhew* (d). The Vice-Chancellor relied on *Burrell v. Baskerfield* (e). We do not dispute the principle of that case and of *Mower v. Orr* (f), that where there are directions given in the will which cannot be carried into effect without a sale of the whole, there is a conversion, though a sale be not in terms directed, permissive language only being used; but we say that principle does not apply to the facts of this case; *Cormick v. Pearce* (g). Here the purposes do not require conversion, and the trustees have not exercised their discretion by selling, no circumstances having arisen to call for a sale. [The LORD JUSTICE TURNER: Does not your construction give the trustees a discretionary power to alter the rights of the parties?] No; if they sold under this permissive authority the surplus proceeds would go to the person entitled to the real estate. If there be no conversion our construction as to the real estate is clearly right. A devise to a man or the heirs of his body will give him an estate tail; *Parkin v. Knight* (h); *Wright v. Wright* (i); *Harris v. Davis* (k); even without an explanatory context, and here the testator has fully explained himself.

With regard to the personality, personal estate is governed

(a) Vol. 1, p. 547, n.

(f) 7 Hare, 475.

(b) 2 Y. & C. Exch. 708.

(g) 7 Hare, 477.

(c) 2 Hare, 35.

(h) 15 Sim. 83.

(d) 6 Sim. 585.

(i) 1 Ves. sen. 409.

(e) 11 Beav. 525.

(k) 1 Coll. 416.

1860.  
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GREENWAY.
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 GREENWAY  
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governed by different rules from real estate, and a gift comprising both is not necessarily to be construed so as to make them go in the same channel, but is to be construed as if the real estate were given by one will and the personal by another, the two being in the same terms except as to the subject-matter of the gift; *Forth v. Chapman* (*a*). Here the gift is one creating an estate tail, and the gift over is on an indefinite failure of issue; unless the Wills Act prevents that construction, it is therefore an absolute gift. [The LORD JUSTICE KNIGHT BRUCE here called attention to the use of the word "leaving."] That word only occurs where the testator is adverting to whether there will be issue to take, and does not occur in the gift over to the next of kin. Now, as to the 29th section of the Wills Act, its operation is excluded by its own express terms in every case in which an estate tail is given. The other side say that this does not help us, for that there is no such thing as an estate tail in personality, and that argument would be of force if the will disposed of nothing but personality; but *Green v. Green* (*b*), shows, that where there is a gift of personality in words which create an estate tail in realty, and a gift over on death without issue, there, if realty is combined in the same gift, the 29th section does not apply as to the personality. *Re O'Bierne* (*c*), is in our favor. [The LORD CHANCELLOR: Yet you say that the will is to be read as two wills, one disposing of real the other of personal estate.] The Vice-Chancellor thought that, even apart from the act, this was not a gift over on an indefinite failure of issue, and referred to *Sheppard v. Lessingham* (*d*), and *Radford v. Radford* (*e*). But in the former case the testator used the word "issue," which

is

(*a*) 1 P. Wms. 663.(*d*) Ambl. 122.(*b*) 3 De G. & Sm. 480.(*e*) 1 Keen, 486.(*c*) 1 Jo. & Lat. 352.

is not a technical term, and is flexible in its meaning; here he has used the words "heirs of their bodies," which are words having a strict legal meaning, not to be departed from on slight grounds; *Tothill v. Pitt* (a); *Butterfield v. Butterfield* (b); *Elton v. Eason* (c); *Britton v. Twining* (d); *Ex parte Wynch* (e); *Bright v. Rowe* (f); *Jordan v. Lowe* (g); *Chandless v. Price* (h). In *Radford v. Radford* the expression was "leaving issue."

*Mr. Craig for Mr. Thomas.*

If after an absolute gift of personal estate there is an executory gift over within the limits of perpetuity, such executory gift is good. If the same gift creates an estate tail in realty, the tenant in tail can defeat the gift over as regards the realty; but, as regards the personality, it is like an executory devise engrafted on a gift in fee, and not too remote, which cannot be defeated. It is not necessary for my purpose to argue that the first takers have only a life estate in the personality. I will assume it to be a quasi estate tail; but I say that the gift over is in case the first takers die without *leaving* issue, the expression "die without lawful issue" being correlative to the preceding expression "leaving lawfully begotten heirs of his body." This, independently of the Wills Act, restricts the failure of issue to the death, so far as concerns the personality. *Forth v. Chapman* is in my favor. *Radford v. Radford* is for me so far as it applies. *Green v. Green* is not against me; for it was a clear case of a gift over on an indefinite failure of issue, and the 29th section of the Wills Act did not apply, for a contrary intention clearly appeared in the will.

In

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|---------------------------------------------|--------------------------------------|
| (a) 1 <i>Modd.</i> 488; 7 <i>Bro. P. C.</i> | (e) 5 <i>De G., M. &amp; G.</i> 188. |
| 453.                                        | (f) 3 <i>M. &amp; K.</i> 316.        |
| (b) 1 <i>Ves. sen.</i> 133, 154.            | (g) 6 <i>Beav.</i> 350.              |
| (c) 19 <i>Ves.</i> 73.                      | (h) 3 <i>Ves.</i> 99.                |
| (d) 3 <i>Mer.</i> 176.                      |                                      |

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In the next place, I contend that the realty is converted. The testator plainly intended the same persons to take the realty and personality; but if the realty was not to be converted, it was obviously probable that it might go in a different way from the personality. The will, taken as a whole, shows a general intention to convert. *Burrell v. Baskerfield* (*a*), is strongly in our favor, and *Mower v. Orr* (*b*), is very like this case. *Polley v. Seymour* (*c*), is relied on against us. In that case, which was cited in *Burrell v. Baskerfield*, there were three circumstances distinguishing it from the present; there was a direction to keep the property in its then state; the real and personal estates were given over according to their different natures and qualities, and the testator spoke of a sale as authorized, not as directed. If, however, the Court be against me on this point, I contend that an estate tail is not created in the realty. The words "heirs of the body" may be words of purchase. In this will they are so as to the personality; *Ex parte Wynch* (*d*); *Re Banks's Trust* (*e*); and the intention being evident that the realty and personality should go the same way, I submit that the same construction ought to be adopted as to the realty.

Mr. W. W. Mackeson for Mrs. Thomas.

The gift over of the personality is good even apart from the Wills Act, for the word "leaving" clearly restricts the failure of issue to the death; *Crooke v. De Vandes* (*f*), where, as here, the word "heirs" was used as to personality, and that case also shows that the word "leaving" may be carried on so as to explain the gift over, as was done also in *Goodtitle v. Pegden* (*g*). *Rutherford*

(*a*) 11 *Beav.* 525.

(*e*) 2 *K. & J.* 387.

(*b*) 7 *Hare*, 475.

(*f*) 9 *Ves.* 199.

(*c*) 2 *Y. & C. Exch.* 708.

(*g*) 2 *Durnf. & E.* 720.

(*d*) 5 *De G., M. & G.* 188.

*ford v. Radford* is almost on all-fours with the present case.

Then I contend that, on the scope of the will, there is a conversion out and out. This is not prevented by the circumstance that the power to sell is in terms discretionary; *Flint v. Warren* (*a*); *Griesbach v. Freemantle* (*b*).

Mr. W. Pearson for *Isabella Woodcock*.

I submit that, apart from the direction to convert, there is not an estate tail in the realty, but that the brothers take for life, with remainder to the survivor for life in case of the death of one without leaving issue living at his death, and that the remainders are to the issue as purchasers, with a remainder over in the event of neither brother leaving issue living at his death. The words, "or the heirs of their bodies" are words of substitution not of limitation, and are intended to provide against death in the testator's lifetime; *Doody v. Higgins* (*c*); *Gittings v. M'Dermott* (*d*); *Montagu v. Nucella* (*e*). *Parkin v. Knight* (*f*), cannot be sustained, "or" being read "and" without any help from the context. Then the gift to the survivor prevents the failure of issue from being indefinite; *Ranelagh v. Ranelagh* (*g*); *Hughes v. Suyer* (*h*); *Turner v. Frampton* (*i*); and the effect is a gift to the heirs of the body as purchasers with a gift over in the event of there not being any. [The LORD JUSTICE TURNER here referred to the word "descend."] That expression is not always used in its strict technical sense; it may mean "devolve."

*Read*

(*a*) 14 Sim. 554.

(*f*) 15 Sim. 83.

(*b*) 17 Beav. 314.

(*g*) 2 M. & K. 441.

(*c*) 9 Hare, App. 32.

(*h*) 1 P. Wms. 534.

(*d*) 2 M. & K. 69.

(*i*) 2 Coll. 331.

(*e*) 1 Russ. 165.

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Read v. Snell (a) was also referred to.

Mr. *Malins* in reply.

In *Griesbach v. Fremantle* the discretion was only as to the time of sale, not as to whether a sale should be made at all. *Parkin v. Knight* has always been treated as good law, and it would be dangerous now to hold that a gift to *A.* or the heirs of his body does not create an estate tail.

Judgment reserved.

The LORD CHANCELLOR.

June 9.

I am of opinion that the decree appealed against, bearing date the 10th of *February*, 1859, ought to be affirmed. This decree is confined to the gift over of the personality to the testator's next of kin, and I think this is a valid gift irrespective of the 29th section of the Wills Act. According to the natural meaning of the words of the will, and according to the decided cases putting a construction on such words, I am of opinion that this was not a gift over upon an indefinite failure of issue. The testator says, "if either brother shall die leaving lawfully begotten heirs of his body, then shall the share or portion of such brother descend to such lawfully begotten heirs, but if one brother shall die without lawful issue, then shall the whole annual income be paid to the surviving brother, or in case of his death also to his lawfully begotten heirs, but in case both brothers should demise without issue lawfully begotten," then over to the next of kin, &c. The first contingency is expressly on either brother dying leaving lawfully begotten heirs of his body. Then come the words,

"but

(a) 2 *Atk.* 642, 647.

"but if one brother shall die without lawful issue,"—evidently meaning without *leaving* lawful issue at the time of his death,—and last comes the contingency of "both brothers demising without issue lawfully begotten," by a *natural*, if not *necessary*, implication meaning "without leaving issue at the time of their death."

According to *Forth v. Chapman (a)*, and various other decisions which have followed the rule laid down in that case, this gift, before the Wills Act, would have been a valid gift over of the personality. It is, therefore, unnecessary to give (and I abstain from giving) any opinion upon the construction of the 29th section of the act, as to whether the words "unless a contrary intention should appear by the will by reason of such person having a prior estate tail," &c., apply to a gift of personality or are to be confined to a devise of *real estate*, in which alone (properly speaking) there can be an "estate tail." The legislature may have loosely applied these words to *personality*, or may have had reasons for intending a distinction between *realty*, in which there may be an estate tail, to be cut off by a disentailing deed, and *personality* not attended by such incidents.

The next subject of appeal is the decretal order of the 17th of *January*, 1860, by which it was declared that the real estates of the testator should be immediately sold, and the monies arising from the sale should make a common fund with the residue of the personality, to be divided between the two brothers during their lives.

Here I am obliged to differ from the view taken by the Vice-Chancellor, that the will operated a conversion of

(a) 1 P. Wms. 663.

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of the realty from the death of the testator. The testator may possibly have expected that the realty and personality might form one *homogeneous* mass and go in the same line of devolution, but he has not used language which can have such an operation. If a testator expressly directs trustees to sell real estate, and to divide the money produced by the sale, or to invest the money in the funds, or to deal with the property in such a manner as he cannot deal with it unless he converts it into money, the realty is supposed to be converted into personality from the death of the testator, and a Court of Equity would be justified in decreeing an immediate sale of it. But a mere power to sell, to be exercised in the discretion of the trustees, or with the consent of a third person, has no such effect. Here the will gives to the executors "power to nominate and appoint other executors as to them may seem fit, and to get in, collect and receive all monies or securities for money, and to sell, dispose of and convert into money all other my real and personal estate, either by public auction or private contract, as to my said executors shall seem meet." He leaves the same discretion as to the sale of the real estate which he did as to appointing other executors—in the one case the words being, "as to them may seem fit," and in the other, "as to my said executors shall seem meet." The will could not convert into *personality* what in the discretion of the executors was to remain *real estate*.

I am likewise obliged to differ from the Vice-Chancellor in the opinion he expressed respecting the interest which the brothers took in the realty. As to the property in *Ceylon*, I can at present give no opinion. This must depend upon the *lex loci rei sitæ*, the civil Dutch law still prevailing there, which may possibly admit and construe the will, or may entirely refuse any validity to the

the will, and dispose of the property by its own rules as in a case of intestacy. But with regard to the testator's real property in *Australia*, where the common law of *England* prevails, I am of opinion that under this will the testator's two brothers took estates tail as tenants in common, with cross remainders in tail, remainder to the next of kin and *Isabella* his god-daughter as tenants in common in fee. It is said that each of the brothers has executed a disentailing deed; and if they have done so, I think they have acquired the fee simple. The testator's supposed expectation that the realty and personalty would follow the same line of devolution cannot give a new sense to the language he has employed, which seems exactly adapted to create the interests I have suggested, and he himself goes on minutely and accurately to detail the incidents and consequences of such interests. I therefore cannot agree with the Vice-Chancellor in thinking that the brothers took only estates for life in the realty, and that the issue were to take as *purchasers*. In the argument great stress was laid on the use of the word "or" in the first limitation, "my brothers *Edward* and *Charles*, or the heirs of their bodies lawfully begotten." But there are various authorities to show that the word "or" so introduced is to be read "and." Here the testator goes on immediately to explain his meaning, lest there should be any doubt about it—"And the meaning of this my will is, that if either brother should die leaving lawfully begotten heirs of his body, then shall the share or portion of such brother descend to such lawfully begotten heirs." How can it be said then that such lawfully begotten heirs shall take by *purchase*?

It was further contended that "or" was used by the testator to prevent a lapse,—meaning that if the brothers should predecease him, their issue might take. But if the

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the whole of the testator's subsequent explanation of his meaning is to be disregarded, the brothers, having survived him, would take a *fee simple*.

I therefore think that there ought to be a reversal of the order for the sale of the real estates, and a declaration as to those in *Australia* that they pass by the will in the manner I have indicated.

With respect to the real estates in *Ceylon*, there must be an inquiry,—what, if any, effect is given to the will by the law of that island; and, if none, how the property will go as upon an intestacy?

The will being framed so as to create great difficulties in construing it, I think that all the costs should be paid out of the estate.

*The LORD JUSTICE BRUCE.*

My view of the construction of this will is the same as that taken by the Lord Chancellor.

*The LORD JUSTICE TURNER.*

I entirely agree both in the conclusions at which the Lord Chancellor has arrived, and in the reasons which he has given for them.



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SIMPSON *v.* THE WESTMINSTER PALACE  
HOTEL COMPANY (LIMITED).

THIS was an appeal by the Plaintiff from a decree of Vice-Chancellor *Wood* dismissing with costs the bill which was filed to restrain *The Westminster Palace Hotel Company (Limited)* from carrying into effect a proposed arrangement for a lease of part of the hotel.

The company was formed under the Joint Stock Companies Act, 1856, by a memorandum of association dated the 12th of June, 1857. The nominal capital was 100,000*l.*, in 10*l.* shares, and the third clause of the memorandum defined the objects of the company as follows:—"The objects for which the company is established are—the purchase of leasehold land in the city of *Westminster*, the erection, furnishing and maintenance of an hotel thereon, the carrying on the usual business of an hotel and tavern therein, and the doing all such things as are incidental or otherwise conducive to the attainment of the above objects."

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A company was established for the purpose of building an hotel, "the carrying on the usual business of an hotel and tavern therein, and the doing all such things as are incidental or otherwise conducive to the attainment of the above objects." The company built an enormous hotel, containing 317 rooms. Before it was opened the directors, with

The assent of  
a majority

of the shareholders, agreed to let a portion of it, containing 169 rooms, unfurnished, to the *India Board*, for offices, at the rent of 6,000*l.* a year, for the term of three years, with an option to the Board to extend it to five years. The directors also agreed to make alterations for that purpose, which it was estimated would cost about 2,000*l.*, and cause a further expense in restoring the rooms to a state fit for hotel purposes. It was established that this agreement was not entered into with a view to the permanent employment of part of the premises for purposes not authorized by the constitution of the company, but was adopted as an interim measure, because the directors believed that the whole of so large a building could not safely and advantageously be opened as an hotel at first, and because they had not capital to open the whole at once:—*Held*, by the Lord Justice *Knight Bruce*, affirming the decision of Vice-Chancellor *Wood*, the Lord Justice *Turner* dissenting, that the agreement was not ultra vires, and that the Court ought not to interfere.

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The following clause relative to the powers of the directors was contained in the articles of association:—  
 “The directors shall, subject to the powers of the general meetings, have the entire management of the company, and they shall have power to appoint and to fix the duties and salaries of the secretary, manager, and all clerks, officers and servants, to conduct legal proceedings, refer disputes to arbitration, and to enter into, alter or rescind contracts in such manner as they shall think fit, and also to incur debts in the ordinary course of business, and to issue bills of exchange and promissory notes, and also to advance upon security any money which may be in their hands and not immediately required for the purposes of the company, and, generally, to do all acts, matters and things which are necessary for carrying on the business of the company.” Neither the memorandum nor articles contained anything else which was referred to as material.

The company having obtained a leasehold site for a term of ninety-nine years, proceeded to erect an hotel containing 317 rooms, which at the time of filing the bill was nearly completed, but not opened as an hotel.

In the year 1860 the board of directors entered into an arrangement with Sir *Charles Wood*, the Secretary of State for *India*, to grant him a lease of the western part of the hotel, comprising 169 rooms, for three years, at a rent of 6,000*l.*, with a power to the lessee at his sole option to extend the term to five years. It was stipulated in the heads of agreement that the directors should make various alterations in the demised premises for the purpose of fitting them for the use of the *India Board* as a set of public offices. It was further stipulated, that the Secretary of State for *India* should have possession of the three topmost floors, with liberty of access thereto by

by the 15th of *April*, 1860, with possession of the remainder in the month of *May*, the rent to commence from the date of final possession, and that the company should have the monopoly of supplying the demised premises with all provisions, wines and liquors.

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At a meeting of the Board of Directors held on the 7th of *April*, 1860, it was resolved that the terms of the contract should be settled immediately by the company's solicitor with the solicitor of the *India Board*, and that the necessary deeds should be prepared and submitted for the sanction of the Board.

An extraordinary general meeting of the shareholders was held on the 1st of *May*, 1860, when the chairman of the company proposed, and the deputy chairman seconded, a resolution:—"That, in the opinion of this meeting, the arrangement made with the *India Board* is a beneficial arrangement in the interest of the company, and that the board be, and they are hereby, requested to take measures to carry the same into effect." To this an amendment was moved, that proceedings in respect of the agreement should be stayed, and a committee of investigation appointed; but the amendment was rejected, and the original resolution carried. A poll was then demanded, at which the original resolution was also carried by 1,690 votes against 1,345.

Some correspondence then took place between the solicitors of the directors and some of the dissentient shareholders, but the directors having expressed their determination to abide by the agreement, the Plaintiff filed his bill on behalf of himself and all the other shareholders against the company and Sir *Charles Wood*, praying that it might be declared that the agreement was invalid and beyond the powers of the company, and that the

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the company might be restrained from granting any lease of any portion of the hotel to Sir *Charles Wood*, and from expending any of the funds of the company in making alterations in pursuance of the agreement, and from otherwise performing the agreement on the part of the company.

The Defendants produced evidence from persons who were, or had been, largely concerned in hotel-keeping, who deposed that rooms in hotels were occasionally let for considerable periods, and rents paid only at stated intervals. It was also shown that the company had called up 8*l.* 15*s.* on each 10*l.* share, and borrowed 10,000*l.*, so that the whole further amount of calls that could be made was 12,500*l.*, and the borrowing powers only extended to 25,000*l.* in all, so that no more than 27,500*l.* could now be raised. It was further deposed, that after raising this sum, and furnishing the whole of the hotel, there would only be left in hand about 5,000*l.*, a sum not sufficient for commencing a concern of such magnitude. That it was inexpedient to open at once the whole of such an enormous establishment, and that the part which was to be opened as an hotel would of itself be the largest hotel in *London*. The Plaintiff's evidence showed that it would cost about 2,000*l.* to remove the alterations, so as to restore the demised property to a condition suitable for hotel purposes upon the determination of the tenancy.

The cause came on before Vice-Chancellor *Wood* on motion for a decree. His Honor held that the arrangement did not exceed the powers of the directors, being a prudent mode of employing part of the property until the whole could be used for the immediate purposes of an hotel; it not being in dispute that the directors were bona fide proceeding to carry out the objects of the memorandum

memorandum of association, and intended this letting as a merely provisional arrangement until the whole of the building could in their opinion be safely and prudently used as an hotel. His Honor accordingly considered that no case was made out for the interference of the Court, and dismissed the bill with costs.

*Mr. Giffard and Mr. Jessel, for the Plaintiff.*

We do not dispute the proposition that the Court will not interfere with the discretion of the directors of a company, but it is equally plain that the Court will restrain them from acting in excess of their powers. The present case we say is like *Cohen v. Wilkinson* (*a*), and is also within the principle of *Natusch v. Irving* (*b*) and *Const v. Harris* (*c*). The limits of the directors' authority are defined by the memorandum of association which states the objects of the company. Now letting a large part of the building for the purposes of a public office is as far removed from carrying on an hotel business as anything can be. The letting is for a long term, it is no part of the usual business of the hotel to let even a room for so long a period, the rooms are to be let unfurnished, and not for the purpose of temporary residence for which alone rooms in an hotel are usually let. The Vice-Chancellor, we submit, did not attach sufficient weight to the consideration that the object of the company was the carrying on the "usual" business of an hotel. What the directors propose is, giving up the exclusive occupation of a large part of the building to the *India* Board for several years, and the company moreover will be fixed with a considerable expense in respect of the requisite alterations, which is an unauthorized expenditure of their capital. The Vice-Chancellor said we might have had

a case

(*a*) 12 *Beav.* 125, 138.

(*c*) *Turn. & R.* 496.

(*b*) *Gow on Partnership*, 388.

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a case if this part of the building had once been opened as an hotel; but it is difficult to see what distinction that can make, what they propose to do being ultra vires, as the articles give no power of leasing. The Vice-Chancellor admitted that what the directors were doing did not come under the head of carrying on the usual business of an hotel, but relied on the evidence that in the present state of the neighbourhood it would be hazardous to open the whole building at once as an hotel, he considered therefore, that the steps taken by the directors came within their powers as being steps towards the safe carrying out of the scheme for establishing the hotel. This comes to no more than that the directors consider what they are doing beneficial to the company, and the argument, if carried out to its legitimate consequences, would justify a railway company in turning the railway into a canal. The majority of shareholders in *Cohen v. Wilkinson*, thought what they were doing beneficial to the company, yet an injunction was granted, and *Colman v. Eastern Counties Railway Company* (a), proceeds on the same principle. There is no case of necessity made out, it is not disputed that there are funds enough to furnish the whole building as an hotel and open it as such. The Vice-Chancellor said they might have built half the hotel and the Court could not have interfered to prevent them from opening that half without proceeding to build the other. We do not admit the correctness of this proposition, but we need not argue it, for the present case is not analogous, what we complain of being a positive act of the directors in applying the greater part of the building to purposes utterly alien from the purposes of an hotel and tavern.

[*The LORD JUSTICE KNIGHT BRUCE* adverted to the words "or otherwise conducive."]

An

(a) 10 *Bear.* 1.

An arrangement which involves a large outlay, making the rooms unfit for hotel purposes, and which makes it impossible to use them for those purposes for three years, or at the option of the lessee for five years, cannot be called "conducive" to the attainment of the objects mentioned in the memorandum.

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Mr. *Rolt* and Mr. *Cotton*, in support of the order of dismissal.

This is the establishment of a new concern on an unprecedented scale, and it is necessary to leave the directors a wide discretion as to the mode of starting it. There is no contract that the hotel shall be opened with the full number of beds at first, so the directors might certainly leave half of it unfurnished, until they found that the business had advanced enough to require the whole. Then on what possible ground can it be said that they may not make some profit out of the part which is not wanted, provided they retain the power of resuming possession within a reasonable time. This is an appeal from the discretion of the directors, who are of opinion that the whole cannot be worked at a profit for the next four or five years. If the Court could see that the directors were really depriving themselves of the power to carry into execution the objects of the company, it would interfere. That was the case in *Cohen v. Wilkinson*, where the company were about to abandon the construction of the longer line, and let their parliamentary powers of making it expire. If the company had been restrained from opening their railway with a single line of rails, the case would have been an authority for the Plaintiffs, for we are doing something analogous to that. So if there be a real attempt to carry on a new business not authorized by the constitution of the company, which was the case in *Natusch v. Irving*, the

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Court will interfere. Here the company is *bonâ fide* feeling its way towards carrying out the objects of the memorandum to their full extent; there is no evasion, nothing but a prudent delay, and an interim use of the unemployed part of the building in a way which will make it profitable until it can be used for its proper objects. It is considered that even to open the hotel on the limited scale we shall need all our capital and all the money we can prudently borrow. That the arrangement causes some outlay is nothing, if the plan be otherwise proper; it is laying out 2,000*l.* to get 6,000*l.* a year. [*The LORD JUSTICE TURNER:* Do you say that when you have opened half the building you are at liberty to apply the other half to purposes unconnected with the business of an hotel?] Not for a continuance; but we say we may do so for the purposes of interim occupation, if we provide for resuming possession in a reasonable time. [*The LORD JUSTICE KNIGHT BRUCE:* May there not be a question whether five years is a reasonable time?] We submit that the Court will not interfere on that ground. If the term had been a considerable part of our ninety-nine years' term, the Plaintiff would have had a case, for it might then have been contended with reason, that the transaction was colourable; but the parting with possession for five years is perfectly consistent with a *bonâ fide* intention to open the whole hotel as soon as it can be done with a reasonable prospect of success. Having the offices of the *India Board* in the building will gain us a connection, and so be conducive to attaining the objects proposed by the memorandum. Even apart from that, where there is so much risk in opening the whole concern at once, it is conducive to those objects to enter into an arrangement which will ensure a certainty of profit from the very commencement.

Mr.

Mr. *Forsyth*, for Sir *Charles Wood*, took no part in
the argument.

Mr. *Giffard*, in reply.

Judgment reserved.

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The Lord Justice Knight Bruck.

In this cause there is no ground for imputing fraud or bad faith to the directors or the majority of shareholders opposed to the Plaintiff's views. We must, I think, attribute to those who made and those who supported the impeached agreement with the Indian Secretary of State the intention in making and supporting it of acting properly and beneficially for the interests of the company. That state of circumstances of course, however, though not immaterial, does not of itself amount to an answer to the case of the Plaintiff, who is entitled to a due application of the principles on which *Natusch v. Irving* and *Const v. Harris* were decided. But, in the present instance, the business of the company has not commenced; and while remembering the purposes for which confessedly it was formed, considering also the magnitude of the undertaking, I conceive that it was within the power and legitimate functions of the directors and a majority of the shareholders acting in good faith to confine for a time the hotel business and tavern business of the company to a portion of their buildings, notwithstanding that, as buildings, they were wholly completed. That capacity, I think, included or was accompanied by the capacity of making the other portion, in some reasonable manner, useful and profitable until applied also to hotel purposes or tavern purposes. And I should have thought the letting to the Indian Secretary of State clearly justifiable against

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against the Plaintiff, on those grounds, as a provisional measure for twelve or fifteen months. The length of the term agreed, however, may possibly be five years. This is the one circumstance that has embarrassed me. I am not satisfied, however, that it is necessarily fatal to an arrangement, not, in my opinion, to be justly complained of, unless it was incompetent to the directors and the majority of shareholders to determine on delaying, for so long a period, the opening for hotel purposes and tavern purposes of the parts of the buildings comprised in the agreement. My impression is, that it was competent to the directors and majority of shareholders acting bona fide to take that course, the amount of their means, the magnitude (I repeat) of the entire undertaking, the extent of the buildings not included in the agreement, and the nature and terms of the agreement, being considered. I cannot, therefore, say that the bill, having been dismissed, ought, in my judgment, to be restored. But the case seems to me one of so much difficulty, that if the Lord Justice shall consider that the Plaintiff ought to be relieved from all the costs of the suit except his own, I will certainly accede to that.

The LORD JUSTICE TURNER.

This case has appeared to me to be one of some novelty and of no ordinary difficulty. It is of course incumbent upon the Plaintiff to make out that what is proposed to be done is beyond the powers of the company. It is in that view only that all the shareholders, on whose behalf he sues, have a common interest with him, all being of course bound to the observance of the company's constitution. If it is in the discretion of the directors or of the shareholders, whether what is proposed to be done shall be done or not, the existence of that discretion is, as I apprehend, fatal to the bill. The objects of

of this company are thus defined in the memorandum of association—[His Lordship here read the clause set out above.]

Such being the objects of the company, this case presents, as it seems to me, three points for our consideration. First. Is the letting of a large portion of an hotel to a public board for a lengthened period a carrying on in the hotel the usual business of an hotel and tavern? Secondly. Is such a letting incidental or conducive to the attainment of the objects mentioned in the third clause of the memorandum? Thirdly. Does the constitution of the company leave it in the power of the directors or of the shareholders, in the existing state of things, to authorize, at their discretion, the carrying into effect of the proposed arrangement?

Upon the first two of these questions I feel no difficulty. I do not think that the letting of so large a portion of this building to a government board for so long a period could be said to be the carrying on in the building the usual business of an hotel and tavern. The evidence which has been adduced on the point furnishes no instance of any such thing having ever been done; and, if it has never been done, it cannot surely be said that it is according to the usual business of an hotel and tavern that it should be done. The evidence does not even satisfy my mind that, according to the usual course of business, rooms in hotels are let to individuals for any lengthened periods. There are not, I think, more than one or two instances mentioned in which rents for the rooms have been paid half-yearly; but even assuming that rooms are usually so let to individuals, they are, as I apprehend, so let only in cases where the individuals make the hotels their permanent or temporary homes. It is quite a different question when the rooms are proposed

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posed to be let to a public board, with a large staff of clerks, officers and servants, none of whom would, in the ordinary course, reside at the hotel; and as to the proposed arrangement being incidental or otherwise conducive to the objects mentioned in the memorandum, I do not think it can be held to be so. The words incidental or conducive to the attainment of the objects, so far as they apply to the business, do not seem to me to extend so far as to warrant a scheme for attaining the object of carrying on the business in the entire building by devoting part of the building to a purpose which, as I have already said, does not seem to me to fall within the purposes which were contemplated. Coupled as the words "incidental" and "conducive" are together, they seem to me, so far as they apply to the business, to refer to what may be incidental or conducive to the prosecution of the business.

The only difficulty which I have felt upon the case has been upon the third question. I am not prepared to say that, in cases of large undertakings coming to completion as to part at one time and part at another, it may not, in the absence of any provisions to the contrary in the instrument by which the company has been formed, be in the power of the directors or shareholders before the whole undertaking has been completed to employ the parts which have been completed to purposes useful and profitable to the company, and perhaps they may be entitled to do so even though the purposes to which the completed parts are applied be not purposes within the scope of the undertaking, although I have much doubt upon that point, and do not intend to give any opinion upon it. My difficulty has turned upon the question, whether such considerations as these may not apply to this case, and, if they do apply, what effect ought to be given to them. In the result, however, I have

have come to the following conclusion. I think that, assuming it to be competent to the directors or shareholders to deal with this property, ad interim before the whole hotel can be opened, at their discretion, it is not and it cannot be competent to them to deal with it in such a manner as may interfere with the ultimate purpose of the company, the opening of the entire hotel. I am not satisfied, upon the facts before us, that the whole hotel might not be opened at once, and I am far from satisfied that, in any event, the whole might not be opened before the expiration of the three years for which the lease is proposed to be granted, and, with all due deference, therefore, to the opinion of the Vice-Chancellor and of my learned Brother, my opinion is that the injunction prayed by the bill was due, and that the bill ought not to have been dismissed.

It was suggested at the bar that there was not capital to open the whole hotel. Supposing it to be so, it would not alter my view of the case. I think in that case it would depend upon the extent of the deficiency whether the undertaking should be considered to have failed altogether, or whether part should be opened and the rest left unopened. I do not think that, even in the case supposed, the directors or shareholders could have power to let the unopened part in such a manner as could interfere with its being opened.

My learned Brother agreeing in opinion with the Vice-Chancellor as to the dismissal, the decree will, of course, be affirmed so far, but I have thought it right to state the reasons which have led me to the opposite conclusion, from an apprehension that this case may be made the foundation of claims by other directors and shareholders to deal ad interim with property belonging to companies, in a manner which may not be warranted,
and

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and that it is right, therefore, that my opinion upon the subject should be stated. My learned Brother having left it to me to say whether the costs in the Vice-Chancellor's Court ought to have been given against the Plaintiff, I can, of course, have no hesitation in stating that, in my opinion, they ought not, and that to this extent, therefore, the decree ought to be altered.



In the Matter of CHARLOTTE BLOOMAR, a  
Lunatic.

June 25, 29.

Before The  
LORDS JUS-  
TICES.

A lunatic being tenant in tail of an undivided share of an estate, a decree for partition was made, which directed that the lunatic's costs should be raised by mortgage of the land allotted to her in severalty. On the completion of the partition the lands allotted to the lunatic were conveyed to her simply in tail, without any provision for raising the costs:—*Held,*  
by the Lords

THIS was a petition seeking to raise out of lands, which had been allotted to the lunatic on a partition, the amount of costs which, by the decree, was directed to be borne by them.

In 1854 one undivided fourth share of certain estates was vested in *Augusta Singleton*, widow, in fee; another fourth in *George Hopkins* and *Martha* his wife in fee; another fourth in *W. S. S. Lockwood* and *Thomas Willey* in fee, upon certain trusts; and the remaining fourth stood limited to *Charlotte Bloomar* in tail, with remainder to her brother *Isaac Dawson Bloomar*, then an infant, and the heirs of the body of his late father. Miss *Bloomar* had been found a lunatic in 1849.

On 25th July, 1854, *Augusta Singleton* filed her bill for partition of the property against the other persons above named, and several persons who had estates in Miss *Bloomar's* fourth share expectant on the determination of the above estates tail.

By

Justices sitting in Lunacy, that they had no jurisdiction to authorize the committee to mortgage the land for the purposes of raising the costs.

By an order made on further consideration on the 9th of December, 1857, it was ordered that the hereditaments comprised in the first part of the schedule to the Chief Clerk's certificate should be conveyed in severalty to *Augusta Singleton* (now *Basford*) in fee; those in the second part of the schedule to *John Sodon* (a mortgagee from *Hopkins* and wife) in fee; those in the third part of the schedule to *Lockwood* and *Willey* in fee; and those in the fourth part of the schedule "to, for and upon such uses, trusts, intents and purposes as at the date of such conveyance shall be subsisting of and concerning the one undivided fourth part or share of the hereditaments comprised in the said schedule of or to which the Defendant *Charlotte Bloomar* is now seised or entitled for an estate in fee tail in possession, with divers remainders over." The order proceeded to direct that all proper parties should execute conveyances for the above purposes, such conveyances to be settled by the Judge. It was then declared that *Charlotte Bloomar* was a trustee within the meaning of the Trustee Act, 1850, of the estate and interest vested in her in the hereditaments comprised in the first, second and third parts of the schedule, and it was ordered, that the costs of all parties should be taxed, and the Taxing Master was to certify the respective amounts of such costs, excluding the costs incident to the commission of partition and certain other parts of the proceedings; and he was to certify the aggregate amount of such excluded costs, which aggregate amount was to be divided into four equal parts; and directions were given for raising out of each estate allotted in severalty the costs of the parties interested in it (other than the above excluded costs), and one fourth of the aggregate amount of the excluded costs; the direction to which the present application related being that the costs of Miss *Bloomar* and certain other parties (except the said excluded costs), and one fourth

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fourth of the excluded costs, should be raised by mortgage of the whole or some part of the hereditaments comprised in the fourth part of the schedule.

By an order dated the 22nd of *December*, 1857, made on the petition of Miss *Bloomar* by her committee in the matter of the Trustee Act, 1850, and of the Lunacy Regulation Act, 1853, and reciting the order of 9th *December*, 1857, it was ordered "that the said *Wm. Stretton*, the committee of the estate of the said *Charlotte Bloomar*, do in her name and on her behalf convey the estate and interest of the said *C. Bloomar* in the said hereditaments as directed by the said decree."

By an indenture dated the 14th of *February*, 1859, made for carrying into effect the order of 9th *December*, 1857, the estates were conveyed to *Joseph Harris* and his heirs, to hold the same freed and discharged from all estates tail, and all remainders or limitations over, expectant or dependent upon any estate tail, to *Joseph Harris* and his heirs to the uses therein declared. The uses declared of the lands allotted in respect of Miss *Bloomar's* share were to the use of Miss *Bloomar* in tail, with remainder to *Isaac Dawson Bloomar* in tail, with divers remainders over. This deed was executed by *Stretton*, the committee of the estate, but was not inrolled within six months under the Fines and Recoveries Act. To remedy this defect, *Stretton*, by an indenture dated 4th *February*, 1860, conveyed Miss *Bloomar's* undivided share to *Harris* and his heirs, to the uses declared by the last-mentioned deed.

Miss *Bloomar*, by her committee, now presented this petition, asking that the committee might be authorized to raise by mortgage of the estates vested in her in severalty the costs which, by the order of 9th *December*, 1857,

1857, were directed to be raised out of them, amounting to 397*l.* 4*s.* 5*d.*

Mr. Purcell for the Petitioner and Mr. Craig for the committee supported the application, and referred to 1 *Will.* 4, c. 65, s. 28; 1 & 2 *Vict.* c. 110, ss. 26, 33 and 48, and submitted that under the 16 & 17 *Vict.* c. 70, s. 124, their Lordships had jurisdiction to deal with the land for the purpose of raising the costs.

*The LORD JUSTICE KNIGHT BRUCE.*

In my judgment we ought not to try such an experiment as is sought by this petition.

*The LORD JUSTICE TURNER.*

I am of opinion that we have no jurisdiction to do what is asked. There has been a mistake in the deeds of 14th *February*, 1859, and 4th *February*, 1860. The conveyance ought to have been in a form providing for the raising of the costs, instead of which the land was conveyed to the lunatic as tenant in tail, and we have no power to deal with it as asked by this petition (a).

(a) After the failure of this application Miss Bloomar, by her committee, presented a petition in the cause, praying that there might be indorsed on the indenture of partition of the 14th of *May*, 1859, and upon the indenture of confirmation of the 4th of *February*, 1860, respectively, a declaration that the limitations to the use of Miss Bloomar and the heirs of her body, with divers remainders over, expressed to be made by the same indentures respectively, were to be considered as being in equity subject to a

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prior charge of the amount of the said costs, charges and expenses which, by the said order of the 9th of *December*, 1859, were ordered to be raised by mortgage of the hereditaments limited to the use of Miss Bloomar and the heirs of her body, with divers remainders over.

On 27th *July*, 1860, Vice-Chancellor Stuart made an order as prayed, and directed that the indorsements should be made by the registrar on the deeds. See *Seton on Decrees*, 2nd ed. p. 264.

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*June 29.**Before The  
LORDS JUS-  
TICES.*

Where an injunction is granted until answer "or further order," it is not dissolved ipso facto by the defendant's putting in a sufficient answer, but remains in force until it is discharged by order of the Court, the practice this respect not being altered by the stat. 15 & 16 Vict. c. 86.

**OODDEEN v. OAKLEY.**

**T**HIS was a motion by the Defendant *Farrant*, to discharge an order of the Master of the Rolls.

The bill was filed to restrain the Defendants *Oakley*, *Burnand* and *Farrant* from negotiating or taking proceedings at law upon certain bills of exchange accepted by the Plaintiff. *Farrant* was the indorsee of three of these bills, and the case alleged by the bill was, that the Plaintiff's acceptance had been procured by fraud, and that *Farrant* took them for a nominal consideration and with notice of the fraud.

On 25th *March*, 1860, his Honor the Master of the Rolls granted an injunction to restrain *Farrant* "from negotiating or parting with the three alleged acceptances for the sum of 1,000*l.* each so indorsed or delivered to him as in the Plaintiff's re-amended bill mentioned, and from commencing or prosecuting any action, suit or other proceeding against the Plaintiff upon or in respect of the last-mentioned acceptances or any of them until the said Defendant *J. G. Farrant* shall put in his answer to the Plaintiff's said amended bill or further order, and any of the parties interested are to be at liberty to apply as there shall be occasion." In opposition to the motion for this injunction *Farrant* read among other evidence an affidavit made by himself on the same day.

On 7th *April*, 1860, *Farrant* filed his answer, to which no exceptions were taken.

On 12th June, issue not yet having been joined, the solicitors

solicitors of the Plaintiff gave notice to the Defendants *Staunton* and *Farrant* to attend and be cross-examined. The Defendants attended but objected to be cross-examined, *Farrant's* objection being, that it was not proposed to use his cross-examination on any proceeding then pending in the Court or at the hearing, and also that issue had not been joined. The examiner took a note of the objection and requested the parties to bring the matter before the Court.

At this time *Farrant*, who considered that the injunction was gone ipso facto as soon as the time for excepting to his answer had expired, was proceeding with his action, and had given notice of trial for the sittings after Trinity Term.

The Plaintiff, on 20th June, moved at the Rolls that the injunction might be continued until *Farrant* had been cross-examined. The Master of the Rolls ordered the motion to stand over till the next day, that *Farrant* might determine whether he would undertake to present himself for cross-examination in the action. On the 21st *Farrant* having declined to give any such undertaking his Honor made an order restraining *Farrant* from proceeding with his action until he should have been cross-examined or until further order. *Farrant* now moved by way of appeal to discharge this order and also to have the venue changed from *London* to *Oxford*.

*Mr. Lloyd and Mr. Beales, for Farrant.*

This order is irregular, there being no proceeding pending before the Court, and there is nothing either in the act or the orders to justify it. 15 & 16 Vict. c. 86, ss. 38, 40; *Consolidated Orders*, XIX, 9, 12, 13, show that to warrant cross-examination either there must be some interlocutory

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interlocutory application pending or the cause must be at issue.

*Mr. Roundell Palmer, Mr. Bird and Mr. Graham Hastings, for the Plaintiff.*

As to cross-examination on the answer, we moved on *Farrant's* answer for an extension of the injunction, the answer therefore under sect. 59 of the act was to be treated as an affidavit, and was an affidavit used in a pending application, so as to make the Defendant liable to cross-examination. As to the affidavit, it was used in opposition to the original motion for an injunction, and under the order liberty to apply was reserved, which constitutes a pending application. We submit, however, that it is not necessary that there should be a pending application, the 40th section of the act contains nothing to require it, and *Clark v. Law* (a), tends to support this view. [*The LORD JUSTICE KNIGHT BRUCE*: It is right for me to state my present impression to be that the injunction of 26th *March*, could not be dissolved without special motion upon notice, and that therefore if the order under appeal were out of the way the injunction would still be in force. *The LORD JUSTICE TURNER*: I am under the same impression.] Unless the other side had acted on the view that the injunction was gone we should not have made the application of the 20th of *June*. [*The LORD JUSTICE KNIGHT BRUCE*: Do the counsel for Mr. *Farrant* agree that the injunction is subsisting apart from the order under appeal?] *Mr. Lloyd*. We do not. [*The LORD JUSTICE KNIGHT BRUCE*: We will hear you upon that.]

*Mr. Lloyd.*

The act 15 & 16 Vict. c. 86, s. 58, assimilates the practice

(a) 2 K. & J. 28; 2 Jur., N. S. 228.

practice as to common injunctions to that relating to special injunctions, and the old rules relating to common injunctions have no application now; *Lovell v. Galloway* (*a*). Under the old practice a common injunction was granted only because a Defendant was in default, the Plaintiff having obtained it by reason of such default, was *prima facie* entitled to retain it, and the Defendant was obliged to take active steps to get rid of it, by moving to discharge it after he had ceased to be in default. In the present state of things, where an injunction is granted until answer, there is no reason why it should subsist for a moment after a full answer has been put in, nor do the words import that an order is requisite to discharge it. As to the alternative "or order," that means an order previous to the answer, as was often stated by Lord *Eldon*.

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*The LORD JUSTICE KNIGHT BRUCE.*

Notwithstanding the disjunctive expression in the order of the 26th of *March* last, I am of opinion that the injunction granted by it is of such a nature that, notwithstanding a full answer filed, it could not be dissolved without a special order made on notice. I think, therefore, that the injunction would have remained in force if the order under appeal had not been made, and that it is in force. The order under appeal is therefore unnecessary, for the Plaintiff's case may be brought forward upon any application by the Defendant *Farrant* to dissolve the injunction. Consequently, without giving any opinion as to the course which ought to be taken upon such an application, when made, if it shall be made, I am of opinion that the order under appeal ought to

(*a*) 17 *Beav.* 1.

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to be discharged without prejudice, and that the costs ought to be costs in the cause.

The LORD JUSTICE TURNER.

This injunction was granted until answer or further order. Whether it ought to have been granted in that form is a question with which, on the present application, we have nothing to do. Perhaps, under the modern practice, the form ought to be until answer, with or without liberty to apply; but, on the present occasion, we can only deal with the order as it stands. Now, according to the settled practice before the passing of the Act 15 & 16 Vict. c. 86, an injunction, which had been granted till answer or further order, continued in force after the putting in a full answer, until an order was made to discharge it; and I see nothing in the statute to authorize the giving to an order in these terms a different effect from what it had before. I agree, therefore, that the right course is to discharge this order without prejudice to any question.

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RICKETTS v. MARTIN.

THIS was a motion on behalf of the Plaintiff to vacate the enrolment of a decree of the Master of the Rolls dismissing the bill with costs.

The suit was instituted for the specific performance of a contract for the sale of certain leasehold property. The execution of the contract for sale was admitted by the Defendant, but the defence was that the contract had been abandoned.

The cause was heard before the Master of the Rolls on the 20th and 23rd *April*, 1860. His Honor reserved his judgment, and afterwards, on the 25th *May*, made an order dismissing the Plaintiff's bill with costs.

It was deposed by the clerk of the Defendant's solicitor, that, the draft order having been settled by the Clerk of Records and Writs, and the engrossment thereof obtained, the order was left at the Registrar's Office to be passed; that at a quarter to eleven on the morning of the 14th *June*, the deponent obtained the same from the entering seat duly passed and entered; that immediately afterwards, i.e. a few minutes after eleven, he left the docket with the order at the seat of the Clerk of Records and Writs, in whose division the cause was, for enrolment, when he was informed by the officer that he (the deponent) had done all that was necessary, and that it was the officer's duty to see that the enrolment was duly completed;

Lord Chancellor's signature to be exhibited thereto on the 20th *June*:—*Held*, that the caveat came too late to prevent the enrolment.

'June 30.
Before The
Lord
Chancellor
Lord
CAMPBELL.

On the 14th *June* the docket of a decree at the Rolls dismissing the Plaintiff's bill was deposited with the Clerk of Records and Writs for enrolment, and on the same day forwarded to the office of the secretary of the Master of the Rolls, who signed it on that day. On the 15th *June* a caveat was lodged at the office of the secretary of the Master of the Rolls, where both the docket and the caveat remained till the 19th, when the docket signed by the Master of the Rolls was returned to the Clerk of Records and Writs, who procured the

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pleted ; that at two o'clock of the same day he went to the office of the secretary of the Master of the Rolls, and was there informed that the docket had some time previously been brought in for signature, and that no caveat had then been entered.

On the other hand, an affidavit of the clerk of the Plaintiff's solicitor was read, stating that, immediately after judgment in the cause was delivered, the deponent received instructions to lodge a petition of appeal ; that at the time of receiving such instructions he was under an impression that a caveat entered against the inrolment of a decree, immediately on the same being passed and entered, would secure to the Plaintiff an opportunity of presenting a petition of appeal ; that on the 14th *June* he prepared a caveat to be entered with the secretary of the Master of the Rolls against the inrolment of the decree, but did not arrive at the secretary's office to lodge the same till a few minutes after three o'clock, when the office closed ; that at one o'clock on the 15th he left the caveat at the office of the secretary, where it was received, and that he believed it to have been lodged in time to prevent the decree from being inrolled ; that on the 19th, he was, for the first time, informed that the decree had been inrolled ; that he forthwith went to the office of the secretary, by whom he was then informed that his Honor had signed the docket previous to the caveat being lodged, and that the caveat was therefore a nullity.

It was admitted, on both sides, that the docket had been signed by the Master of the Rolls on the 14th *June*, the day on which it was left at the secretary's office ; that the docket so signed, and the caveat lodged on the 15th, had remained in that office until the 19th, when the docket,  
signed

signed by the Master of the Rolls, was returned to the office of the Clerk of Records and Writs, and that it was signed by the Lord Chancellor on the 20th.

Mr. *Selwyn* and Mr. *E. R. Turner* in support of the motion.

It is submitted that the caveat in this case was lodged in time to prevent the enrolment of the decree. It is in time if lodged prior to the docket leaving the last place of deposit, for the purpose of being taken to the Lord Chancellor for his signature. Under the old practice, it was in time if lodged before the docket had been left at the office of the Secretary of Decrees and Injunctions for the signature of the Lord Chancellor. By statute 15 & 16 Vict. c. 87, s. 23, the office of Secretary of Decrees and Injunctions was abolished, his duty being thenceforth to be performed by the Clerks of Records and Writs. A caveat lodged at any time before the docket was left at the office of the Clerk of Records and Writs, for the purpose of having the Chancellor's signature adhibited, i. e., at any time before the 19th, when the docket was sent from the office of the secretary of the Master of the Rolls signed by his Honor was, it is submitted, in time to prevent a valid enrolment; *Burnet v. Theobald* (a); *Daniell's Chancery Practice* (b).

Mr. *Roundell Palmer* and Mr. *J. H. Taylor* for the Defendant.

By the statute abolishing the office of Secretary of Decrees and Injunctions, the Clerks of Records and Writs are appointed to perform the duties of the officer removed. When, therefore, the docket was received by the Clerk of Records and Writs on the 14th of June, it was received by him for the purpose of performing the duty

(a) 1 P. Wms. 609.      see *Smith's Chancery Practice*,  
 (b) 2nd edit. pages 1006-7-8; page 471, 6th edit.

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duty of obtaining the annexation of the signature of the Chancellor, which was formerly performed by the Secretary of Decrees and Injunctions; and the act of leaving the docket with the Clerk of Records and Writs since the statute has precisely the same effect in preventing the reception of a caveat, as its deposit with the Secretary of Decrees and Injunctions had before the statute. The deposit is now as then for the purpose of obtaining the signature of the Lord Chancellor, the preliminary form of obtaining that of the Master of the Rolls being, since the statute, also gone through by the Clerk of Records and Writs. But for the accident that the Lord Chancellor was not on that day sitting in Court, the whole might have been carried through on the same day. It is the delivery of the docket which completes the enrolment, and a caveat entered after that has taken place is useless, though the signature of the Lord Chancellor may not be actually affixed till after its entry; *Barnes v. Wilson* (a).

Mr. Selwyn replied.

*The LORD CHANCELLOR.*

I am of opinion that there is no ground for vacating this enrolment. Before the statute 15 & 16 Vict. c. 87, all caveats came too late after the docket had been lodged with the Secretary of Decrees and Injunctions: that is admitted. The Secretary of Decrees and Injunctions was considered as the functionary of the Lord Chancellor to receive the decree for his signature. Therefore, after the docket was lodged with the Secretary of Decrees and Injunctions, it was considered in effect as signed by the Lord Chancellor. Then came the statute 15 & 16 Vict. c. 87, by the 23rd section of which it was

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(a) 1 Russ. & Myl. 486.

(among other things) provided, that the office of Secretary of Decrees and Injunctions should cease and determine, and that the duties theretofore performed by him should be thenceforth performed by the Clerk of Records and Writs. Therefore the Clerk of Records and Writs was substituted for the Secretary of Decrees and Injunctions; and lodging the docket with the Clerk of Records and Writs has now precisely the same effect as lodging it with the Secretary of Decrees and Injunctions had before the statute was passed. That took place on the 14th of *June*, and, in my opinion, the docket must be considered as having been thenceforth in the possession of the Clerk of Records and Writs. That being so, it seems to me clear that the caveat lodged with the Secretary of the Master of the Rolls on the 15th came too late.

The motion must be refused; and as it has been attempted to be supported by imputations of mala fides against the Plaintiff's solicitor, which have turned out to be groundless, it must be refused with costs.

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*June 20,  
July 4.  
Before The  
Lord  
Chancellor  
LORD  
CAMPBELL.  
A testator  
gave his re-  
siduary estate  
upon trust, in  
case he left  
no child him  
surviving, for  
his wife for  
life, if she  
should so long  
continue his  
widow, but if  
she should  
marry again,  
upon trust to  
pay one-half  
of the divi-  
dends, and  
after her death  
upon trust to  
pay the whole  
thereof to the  
testator's bro-  
ther and sister  
during their  
joint lives,  
equally to be  
divided, and  
after the de-  
cease of either  
of them the  
said brother  
and sister to  
pay the same  
wholly to the  
survivor for  
life, and after the decease of "every of them" his wife, brother and sister, the testator declared that the trust fund and the dividends thereof were to be held in trust for the children of the brother:—Held, that a moiety of the income accruing due after the second marriage of the widow and between the death of the survivor of the brother and sister and that of the widow (who survived them) neither belonged to the widow nor was undisposed of, but belonged to the brother's only child.*

## BROWN v. JARVIS.

THIS was an appeal from the construction put by Vice-Chancellor *Wood* upon the will of the testator in the cause. The words of the will, the events which had happened, and the principal arguments of counsel, sufficiently appear in the Lord Chancellor's judgment.

Mr. *Rolt* and Mr. *Bird*, in support of the appeal, cited *Blackwell v. Bull* (*a*) ; *Davies v. Hopkins* (*b*) ; *Bird v. Hunsdon* (*c*) ; *Jarman on Wills* (*d*) ; *Johnson's, Richardson's and Webster's Dictionaries* on the meaning of the word "every."

Mr. *Daniel*, Mr. *W. H. G. Bagshawe*, Mr. *Miller*, Mr. *Osborne* and Mr. *Bowring* appeared for the several Respondents. They cited *Sarel v. Sarel* (*e*) ; *Saunders v. Vautier* (*f*) ; *Luxford v. Cheeke* (*g*).

Judgment reserved.

## The LORD CHANCELLOR.

This appeal depends upon the construction to be put upon the will of *Robert Brown*, dated the 5th June, 1822,

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| (a) 1 <i>Keen</i> , 176.  | (e) 23 <i>Brav.</i> 87.       |
| (b) 2 <i>Beav.</i> 276.   | (f) <i>Cr. &amp; Ph.</i> 240. |
| (c) 2 <i>Swanst.</i> 342. | (g) 3 <i>Lev.</i> 125.        |
| (d) 3rd edit, p. 510.     |                               |

1822, by which the testator gave the whole of his real estate and the residue of his personal estate to trustees, upon trust to convert the same into money, and after payment thereout of his debts and legacies, to invest the residue of the proceeds thereof in their joint names and hold the same in trust, if he had a child or children, to pay one equal half part of the interest and dividends to his wife and her assigns for her own use during her natural life, and subject thereto for his children in manner therein specified. But in case he should leave no child him surviving, and should not have any child born in due time after his decease, or leaving or having one or more such child or children, if no such child should live to attain a vested interest in the said trust-monies and premises, he thereby declared that his said trustees should stand possessed of the aforesaid trust monies, stocks, funds and securities, and the interest, dividends and proceeds thereof, upon trust to pay the whole of such interest, dividends and proceeds unto his said wife *Rebecca Brown* during her life, if she should so long remain his widow and unmarried; but if she should marry again, then upon trust to pay one equal half of such interest, dividends and proceeds, and from and immediately after the decease of his said wife, upon trust to pay the whole thereof unto his brother and sister of the half blood, *William Brown* and *Ann* the wife of *William Parsons* the elder, during their joint lives equally to be divided; and from and immediately after the decease of either of them the said *William Brown* and *Ann Parsons*, then upon trust to pay the same wholly to the survivor of them during his or her life; and from and immediately after the decease of every of them his said wife, brother and sister, he thereby declared that the said trust-monies, stocks, funds, and securities (or such part thereof as should not have been raised and applied

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under the powers aforesaid), and the interest, dividends and proceeds should be in trust for all the children in equal shares of his said brother *William Brown*, to be vested in them respectively on attaining the age of twenty-one years, and to be payable at that age if his said wife, brother and sister should be then dead; but if they or any of them should be then living, then to be payable immediately after the decease of the survivor of them.

In 1824 the testator died leaving no issue. In 1826 his half brother, *William Brown*, died leaving an only child, the now Plaintiff. In 1828, the testator's widow married again. In 1853, his half sister, *Ann Parsons*, died.

The bill being filed for the administration of the testator's estate, and the testator's widow having died immediately after, the question arose, who was entitled to the interest and dividends of the moiety bequeathed to the half brother and half sister during the interval between the death of *Ann Parsons* and the death of the widow. The widow had received the interest and dividends during this interval; but the Vice-Chancellor ordered the amount to be brought into Court by her executors, the now Appellants, and afterwards declared that according to the true construction of the will, the moiety of the annual income which accrued in respect of the said trust funds which represented the produce of the real and personal estate of the testator, between the day of the death of *Ann Parsons* and the day of the death of the testator's widow, had become divisible among the parties entitled under the will to the capital of the trust funds, in proportion to their respective interests in such capital.

The

The Appellants now appeal against that declaration, contending first, that the widow was entitled under the will to the interest and dividends during this interval; and secondly, that if not, there was pro tanto an intestacy; and that as the widow, she would be entitled to her distributive share of the amount.

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The first contention of the Appellants seems to me to be wholly untenable. True it is, that on failure of children, the whole interest and dividends were given to the widow during her life, but only if she should so long remain unmarried; and it was provided that, if she should marry again, only one half of such interest and dividends should be paid to her. Had there been no disposition of the other moiety, she could have claimed no part of it under the will. The two moieties were dissevered on the widow marrying again, and there is nothing in this will to restore to her any interest in the moiety of which she was deprived.

The second contention is more feasible, that as to the interest and dividends of this moiety between the death of *Ann Parsons* and the death of the widow there was intestacy. But on duly considering the language of the will I think it contains enough to support the construction put upon it by the Vice-Chancellor. The Appellants say that until the death of the testator's widow and of his brother and of his sister, the children could not be entitled to any part of the interest or dividends. They admit, however, that if the words had been "after the decease of each of them his said wife, brother and sister, the interest and dividends should be held in trust for the children," there would have been no intestacy.

Now Dr. Johnson tells us in his dictionary that "every" was formerly spelt "everich," that is, ever each, and

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and that the true meaning is "each one of all." The word may be used in this sense although other lexicographers may give another meaning to it, and the testator certainly did not intend to die intestate as to any particle of his property.

I think, therefore, that we are fully justified in holding that the interest of the child of *William Brown*, the Plaintiff in this suit, accrued immediately on the death of *Ann Parsons*, notwithstanding that the widow was still alive. This construction is strongly supported by the decision in *Sarel v. Sarel* (a).

The consequence is, that the appeal must be dismissed with costs.

(a) 23 Beav. 87.

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#### EARL OF SHREWSBURY v. TRAPES.

*July 4.*

Before The  
Lords Jus-  
tices.

The Plaintiff obtained an interlocutory order restraining the Defendant from suing out

THIS was an application by the Plaintiff to restrain the Defendant *Trappes* from putting in force, or continuing to put in force, a judgment obtained by him in an action at law against the Plaintiff, and from executing or causing to be executed any writ of elegit already

execution or taking any proceedings on a judgment at law until further order. The Plaintiff's bill was afterwards dismissed at the hearing, upon which the Defendant issued an elegit and placed it in the hands of the sheriff. The Plaintiff appealed from the order of dismissal and moved before the Court of Appeal to restrain the Defendant, who resided out of the jurisdiction, from enforcing his elegit pending the appeal. The Court made an order that the sheriff should not proceed on the elegit until further order, and named an early day for hearing the appeal, reserving the costs of the application.

*Semble*, the application did not come within Consol. Ord. VI. 12, but was properly made to the Court of Appeal in the first instance.

*Per* the Lord Justice *Knight Bruce*. There is no inflexible rule that a person applying to stay proceedings under a decree pending an appeal must pay the costs of the application,

already issued on such judgment, and from taking any other proceedings thereunder until the Plaintiff's petition of rehearing should have been disposed of or until further order.

The bill sought, among other things, to restrain the Defendant *Trappes* from proceeding at law upon four bills of exchange accepted by the Plaintiff for sums amounting to 16,000*l.* On 28th *July*, 1858, an interlocutory order was made by which *Trappes* was allowed to proceed with the trial of his action, but in case he should obtain judgment he was not to sue out execution or take any other proceedings thereon until further order. On 3rd *January*, 1859, *Trappes* obtained judgment in the action. On 8th *June*, 1860, Vice-Chancellor *Wood* made a decree dismissing the bill with costs. On the 30th of *June* the Plaintiff presented a petition of appeal from this decree, and on the same day *Trappes* lodged with the sheriffs of the several counties in which the Plaintiff's estates lay writs of *elegit* issued on the judgment. The Plaintiff thereupon, on 3rd *July*, gave notice of motion before the Lords Justices to the above effect.

Mr. *Rolt* and Mr. *Cole* for the motion.

Mr. *Willcock*, for the Defendants, took a preliminary objection that the application ought to have been made to the Vice-Chancellor. He referred to the Consolidated Orders, VI. 12. But upon an intimation from the Court that, as the application was not one to stay proceedings upon the decree appealed from, the case did not appear to come within the language of the order, he withdrew the objection.

Mr. *Rolt* and Mr. *Cole* then proceeded to argue, that, as the principal Defendant resided out of the jurisdiction,  
and

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and the Plaintiff, therefore, in the event of his appeal being successful, would have no means of getting the rents refunded, the Defendant ought not to be allowed to receive them pending the appeal. They offered to give security for the amount of all rents which could be obtained under the elegend before the hearing of the appeal.

Mr. Willcock and Mr. Greene for the Defendants opposed the application. They referred to *Walburn v. Ingilby* (*a*).

Their Lordships made an order that the sheriffs should not proceed on the writs of elegend until further order, the order being expressed to be made without prejudice to any question, and they appointed the 16th of July for hearing the appeal.

Mr. Willcock asked for the costs of the motion. He contended that this was not in principle different from an application to stay proceedings under the decree appealed from, and that it was the course of the Court in such cases to make the applicant pay the costs of the application, as he was asking for an indulgence.

The Lord Justice Knight Bruce.

I have often heard it said that in such cases the costs of the application are necessarily to be paid by the person making it, but I have never acquiesced in that view. The costs often are so given, and often ought to be; but in my judgment there is not any inflexible rule on the subject. In the present instance I am for reserving the costs.

The Lord Justice Turner concurred.

(*a*) 1 M. & K. 61.

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ERNEST v. CROYSDILL.

April 24.

July 2.

Before The
LORDS JUS-
TICES.

THIS was a suit which, having arisen out of an appeal motion, was ordered by consent to be heard, originally, by their Lordships. The object of it was to obtain payment to the Plaintiff, as official manager of a provisionally registered company called the *Warwick and Worcester Railway Company*, of a sum of money in the hands of the Defendant, the official manager of another provisionally registered company called the *London and Birmingham Extension, and Northampton, Daventry, Leamington and Warwick Railway Company*, on the ground that it was due from the latter to the former company. The companies will for the sake of brevity be designated in this report as the "*Warwick and Worcester Company*" and the "*Extension Company*".

On the 16th of August, 1845, the *Warwick and Worcester Company* was provisionally registered pursuant to the provisions of the 7 & 8 Vict. c. 110, and a parliamentary contract and subscribers' agreement were executed.

Sums
canals from
certain canal

companies, and afterwards, in 1846, repaid to the other company 14,200*l.* In 1849 both companies were ordered to be wound up under the Winding-up Acts. In 1850 the official manager of the borrowing company sued in equity the canal companies for the 10,000*l.*, and obtained a decree for payment of that amount, but being unable to enforce payment, assigned the benefit of the decree for 7,300*l.*, which was applied partly in payment of debts of the borrowing company, and partly in payment of costs. In 1858 the official manager of the lending company claimed from the official manager of the borrowing company the difference between the 17,000*l.* and the 14,200*l.* Held:—

1. That this balance might be traced and identified as part of the 7,300*l.* received as the consideration for the assignment of the benefit of the decree.
2. That it was payable to the claimant in full.
3. That length of time and change of circumstances, and absence of interference on the part of the lending company in the suit against the canal companies, constituted no defence.

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Sums to a considerable amount were from time to time paid to the bankers of the company by the subscribers, by way of deposit upon their shares, and were subject to the disposition of the general committee of management of the company, or of a finance committee appointed by them.

On the 6th of *October*, 1845, the Defendants Sir *John Edmond de Beauvoir*, *Peter Henry Edlin* and *Frederick Foveaux Weiss* were, together with *Richard Carpenter* and *Seth Nuttal Fisher*, appointed the finance committee of the company, and it was resolved that any three of them should form a quorum, and that the committee should have power to draw upon the bank by cheques, to be signed by not less than three of the members, and to be counter-signed by the secretary.

The *Commercial Bank of London* were the *London* bankers of the company, and on the morning of the 15th of *October*, 1845, there was standing to the credit of the company, at that bank, 33,453*l.*, the whole of which had arisen from the subscribers' deposits.

On the 15th of *October*, 1845, a cheque for 5,000*l.*, signed by three members of the finance committee, and on the 22nd of *October*, 1845, a cheque for 12,000*l.* similarly signed, and both counter-signed by the secretary, were, by the direction of the finance committee, paid into the same bank to the credit of the *Extension Company*, who also had a banking account there, and were also a provisionally registered joint stock company, formed in the same year as the *Warwick and Worcester Company*.

The general committee of management of the *Extension Company* consisted of the same persons as those composing

composing the *Warwick and Worcester Company*, with the addition of two other directors. The finance committee of each of the two companies consisted of the same persons.

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The bill stated that the 5,000*l.* and 12,000*l.* which had been, as above stated, transferred from the account of one company to that of the other, were treated as loans from the *Warwick and Worcester Company* to the *Extension Company*, and were subsequently dealt with, by the latter company, or by their finance committee, as part of the funds and for the purposes of that company.

On the 26th of *May*, 1849, the *Extension Company* was ordered to be wound up under the Winding-up Act of 1848, and the Defendant *Henry Croysdill* was appointed the official manager of the company. On the 26th of *May*, 1849, the *Warwick and Worcester Company* was also ordered to be wound up, and the Plaintiff was appointed the official manager of that company.

On the 14th of *June*, 1858, the Plaintiff carried in a claim against the *Extension Company* before the Master for a balance of 2,800*l.*, being the aggregate of the above sums of 5,000*l.* and 12,000*l.* after deducting 14,200*l.*, which had been in *February*, 1846, paid by the *Extension Company* to the *Warwick and Worcester Company*. The Master disallowed the claim, and on an appeal from the disallowance, which was heard before Vice-Chancellor *Stuart* on the 26th of *January*, 1859, his Honor declined to make any order on the appeal, except that the two official managers were to be at liberty to retain their costs out of the estates of their respective companies.

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On an appeal from this decision to the Lords Justices, and on evidence being adduced for the purpose of showing an adoption on the part of the *Extension Company* of the loans of 5,000*l.* and 12,000*l.*, and on the counsel for the Appellants insisting that under the circumstances a case of tracing or identification of the money could be made out if a suit were instituted for that purpose, their Lordships directed that the order of the Vice-Chancellor of the 26th of *January*, 1859, should be discharged without prejudice to any question, and that the order of the Master, dated the 20th of *November*, 1858, should be varied, and that instead thereof the claim of the Plaintiff should be allowed as a claim against the *Extension Company*, and that the Plaintiff should be at liberty to take such proceedings as he might be advised to establish the claim as a debt against that company, and that the motion in other respects should stand over, with liberty to apply.

The present suit was then instituted, and the bill after detailing the foregoing facts stated to the following effect:—

That on the 21st of *October*, 1845, the *Warwick and Birmingham Canal Company* and the *Warwick and Napton Canal Company* (which were companies incorporated by act of parliament) entered into an agreement in writing with certain members of the general committee of the *Extension Company* for the sale of their canals to the *Extension Company*. And that amongst other provisions contained in the agreement, it was provided that the general committee of the *Extension Company* should pay to the canal companies a deposit of 10,000*l.* on the execution of it. That the agreement was executed at *Warwick* on the 21st of *October*, 1845, and that upon its execution a cheque for 10,000*l.* was drawn

- drawn by three of the members of the finance committee of the *Extension Company* upon the funds of that company in the hands of the *Commercial Bank of London*, and was delivered by the members of the general committee, then present, to Mr. *Heath* of *Warwick*, the solicitor of the canal companies.

That this cheque was paid by Mr. *Heath* on the same day into the *Leamington and Warwick Bank* to the credit of the canal companies, and on the following day was duly honored by the *Commercial Bank of London*, and debited by them to the account of the *Extension Company*.

That at the close of the business of the *Commercial Bank* on the evening of the 21st of *October*, 1845, the balance standing to the credit of the *Extension Company* was 2,949*l.* 14*s.* 9*d.* only, but on the morning of the 22nd, and before the presentation of the cheque for 10,000*l.*, the above-mentioned cheque for 12,000*l.* was paid in to the credit of the said company, and that by means of that payment the *Extension Company* were in funds to meet the cheque for 10,000*l.*, the balance in their favor at the bank after such payment being 14,949*l.* 14*s.* 9*d.*

That the balance of 2,949*l.* 14*s.* 9*d.* in favor of the company on the evening of the 21st of *October*, was, however, entirely owing to the above loan of 5,000*l.* of the 15th of that month, inasmuch as on the morning of the 15th, the balance in favor of the *Extension Company* at the bank was 1,250*l.* 13*s.* 6*d.* only. That on that day the cheque for 5,000*l.* was paid in, and that between the morning of the 15th and the evening of the 21st sums to the amount of 3,300*l.* 18*s.* 9*d.* in the aggregate were drawn out and applied for the purposes of the *Extension Company*, leaving the above-mentioned balance of 2,949*l.*

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2,949*l.* 14*s.* 9*d.*, as appeared by the following account, which was set out in the bill:—

| | 1845. | £ s. d. | | 1845. | £ s. d. |
|---------|----------------------|---------------------------|--|---------------|---------------------------|
| 15 Oct. | Balance to Credit of | | | Contingencies | 1,200 0 0 |
| | Company | 1,250 13 6 | | Prichard | 500 0 0 |
| | Cash | 5,000 0 0 | | Hall .. | 150 0 0 |
| 22 " | Per Warwick and | | | Wright | 500 0 0 |
| | Worcester | 12,000 0 0 | | Wright | 92 3 9 |
| | | | | Contingencies | 858 15 0 |
| | | | | Russell | 10,000 0 0 |
| | | <hr/> £18,250 13 6 | | | <hr/> £13,300 18 9 |

That after payment of the 10,000*l.* there remained, therefore, to the credit of the *Extension Company* at the bank 4,949*l.* 14*s.* 9*d.*, which the bill alleged to have been applied by the general committee to the purposes of the *Extension Company*.

That on the 17th of *May*, 1850, a shareholder in the *Extension Company* named *Bryson* instituted a suit in this Court on behalf of himself and all other the shareholders in that company (except such of the said shareholders as were Defendants) against the *Warwick and Birmingham Canal Company*, the *Warwick and Napton Canal Company*, together with three of the directors of the canal companies, the present Defendant *Henry Croysdill*, as official manager of the *Extension Company*, and the directors of the *Extension Company* who had been parties to the dealing with the canal companies, seeking to have the 10,000*l.* answered and made good by the canal companies and the other Defendants, with interest.

The bill then stated in the 36th, 37th, 38th and 39th paragraphs to the following effect:—

That by the decree in *Bryson's* suit, which was affirmed on appeal (a), it was declared that the canal companies were

(a) See *Bryson v. Warwick and Birmingham Canal Company*, 4 *De G., M. & G.* 711.

were bound to repay the 10,000*l.*, with interest thereon at 4*l.* per cent. per annum, from the 22nd of *October*, 1845. And it was ordered that the 10,000*l.* and interest should be paid to the official manager of the *Extension Company* by the canal companies on or before the 23rd of *September*, 1853.

That the canal companies appealed from the decision, which was confirmed by their Lordships on the 22nd of *December*, 1853.

That the official manager of the *Extension Company* subsequently received from the canal companies the said sum of 10,000*l.* and interest, or some other sum, by way of compromise for the same, and had dealt with the same as assets of the said company.

That in manner aforesaid the *Extension Company* had ratified the borrowing by their finance committee of the aforesaid sums of 5,000*l.* and 12,000*l.*

The prayer of the bill in the present suit was, that it might be declared that the claim of the Plaintiff ought to be allowed as a debt against the *Extension Company*, and that the Defendants might be decreed to pay to the Plaintiff the sum of 17,000*l.*, being the aggregate of the above sums of 5,000*l.* and 12,000*l.*, the Plaintiff being ready and willing, and offering, to give credit for the 14,200*l.*

The Defendant *Croysdill*, by his answer, stated that he believed the 5,000*l.* and 12,000*l.* (which were standing to the account of the *Warwick and Worcester Company* at the *Commercial Bank of London*, and, consequently, as he inferred, portions of the funds of the company) to have been transferred from that account to the account of

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of the *Extension Company*, but whether in the manner in the bill mentioned, or whether in respect of any previous dealings with the funds of the two associations, or under any other or what circumstances, he could not set forth. He believed, however, that such sums, or at all events so much thereof as had been in any manner borrowed or used for the purposes of the *Extension Company*, were fully repaid and satisfied; and that in particular in the month of *February*, 1846, a sum of 14,200*l.* was paid to the *Warwick and Worcester Company* by a cheque for that amount on the account of the *Extension Company* in full payment and satisfaction of all claims and demands of the *Warwick and Worcester Company* or the other company. He did not believe that the transactions mentioned in the bill were in any manner sanctioned by, or indeed known, to any of the persons who for the time being constituted the *Extension Company* other than the directors. He believed that the monies borrowed were applied, as to the greater part of them, in a manner wholly foreign to such purposes and unauthorized by the deeds of the company, and that no claim of any kind was, after the payment of the 14,200*l.*, made by or on behalf of the *Warwick and Worcester Company* upon the *Extension Company* in respect of any dealing or transaction between the two companies, or their directors, until the 14th of *June*, 1858, when the claim now made was brought into the Master's office under the order for winding up the *Extension Company*. He believed that sums to the amount, in the aggregate, of 3,300*l.* 18*s.* 9*d.* were drawn out from the bankers between the morning of the 15th and the evening of the 21st, but not that these monies were drawn out or applied for the purposes of the *Extension Company*. On the contrary it appeared from evidence taken upon an inquiry directed by the Court in the course of winding up the *Extension Company*, that two of the sums constituting portions

portions of the aggregate sum of 5,000*l.*, and amounting to 1,200*l.* and 858*l.* 15*s.* respectively, were applied for purposes unauthorized by the deeds of the company, and altogether improper. He insisted that the 17,000*l.* was not, except to a very small portion thereof, applied for the purposes of the *Extension Company*; and that the same was wholly, or at all events to an extent far exceeding such portion, fully repaid.

With respect to the suit of *Bryson v. The Warwick and Birmingham Canal Company*, he said that shortly after the dismissal of the appeal, suits were instituted in this Court against the canal companies by the holders of debentures of those companies, and that in order to protect the interests of the contributories of the *Extension Company*, and with the approbation of the Master, he, Mr. *Croysdill*, instituted suits against the canal companies for the purpose of having receivers appointed of the tolls of the canals.

That after considerable expenses had been incurred in attempting to enforce the decree against the canal companies, it was found that the only effectual mode of doing so was by applying for adjudication of bankruptcy against them, and that accordingly an adjudication of bankruptcy against one of the canal companies was applied for with the approval of the Master, and that after argument before the Court of Bankruptcy for the *Birmingham* district, the *Warwick and Napton Canal Company* was adjudicated bankrupt (a). That an appeal was brought against the adjudication, and that ultimately the benefit of the decree for 10,000*l.* was, with the approval of the Master, assigned by the Defendant *Croysdill* to one *Richard Child Heath* for 7,300*l.*, being more than could have

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(a) See *Ex parte Croysdill*, 7 *De G., M. & G.* 199.

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have been obtained in respect thereof by the further continuance of hostile proceedings, but that such sum of 7,300*l.* was greatly diminished by the costs incurred in the prosecution of the suit of *Bryan v. The Canal Companies*, and of the suits to obtain receivers, as well as of the proceedings under the bankruptcy. That soon after the assignment had been made of the benefit of the decree the sum payable in respect of the assignment was attached at the suit of Mr. *Prichard*, the engineer of the *Extension Company*, for a debt, and was the subject of further litigation, in the course whereof costs to a considerable extent were incurred, and that a portion of the said 7,300*l.*, amounting to 3,660*l.* 15*s.* was paid to Mr. *Prichard* in respect of his claim. That a further sum of 1,500*l.* was also paid in respect of a debt to Mr. *Pell*, and that sums amounting to 3,200*l.* were applied in payment of the costs and expenses incurred in the course of the proceedings. That more than thirteen years had elapsed since the time at which the sums of 5,000*l.* and 12,000*l.* were alleged to have been advanced by the *Warwick and Worcester Company* to the *Extension Company*, and that more than six years had elapsed from such time and from the latest time at which any dealing took place between the companies before any claim was made in respect of the demands now made by the Plaintiff or on behalf of the *Warwick and Worcester Company* against the *Extension Company*, although the Plaintiff well knew, as the fact was, that the affairs of the last-mentioned company were in the course of being wound up, and although the Plaintiff was well aware, as the fact was, that debts were in the course of being proved under such order, and calls made for the payment thereof, and that a call for such payment had been some time since made as a final call, and although the Plaintiff was well aware that Mr. *Bryson* was taking the aforesaid proceedings to recover the 10,000*l.* from

from the canal companies; but that during the whole of the said time neither the Plaintiff, nor any other person on behalf of the *Warwick and Worcester Company*, made any claim to prove any debt, or gave any notice to the canal companies or either of them of any claim on the part of the *Warwick and Worcester Company* to be interested in the 10,000*l.*; nor did the Plaintiff claim to be interested in the 7,300*l.*, but that he and the *Warwick and Worcester Company* had permitted the affairs of the *Extension Company*, and all matters relating thereto, to be dealt with and disposed of on the footing of there being no further claim against the company or the contributories thereof. And the Defendant verily believed that several of the contributories from whom contributions could have been obtained in respect of such claim, had the same been valid and made in proper time, had died, and that others had left the country, and that others had become bankrupt or insolvent, and that even if such claim had ever any foundation in equity or justice (which to the best of his judgment and belief he denied) it would now be altogether unjust and inequitable to enforce the same against such contributories as had survived, remained in this country, and continued solvent. He submitted to the judgment of the Court whether, under the circumstances aforesaid, any case was shown on behalf of the *Warwick and Worcester Company* to be relieved in the premises, and if so, whether the Plaintiff properly represented such company for the purposes of the suit, and whether he did not, at all events, represent persons having conflicting interests, and whether or not (among others) some who were precluded from instituting such a suit as the present. And also whether the Defendant was, in his capacity of official manager, subject to be sued in respect of the said matters, or any of them, and he claimed the same benefit as if he had demurred to the bill, or had pleaded the several matters stated

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stated in his answer and the Statute of Limitations, or any or any one of such matters or statutes in bar of the relief sought by the bill.

Affidavits were filed in support of the cases made by the Plaintiff and Defendant.

Mr. *Glasse* and Mr. *Baggallay* for the Plaintiff.

Whatever ground there might have been for saying that the contributories of the *Extension Company* could not be bound by the act of their directors in borrowing from the *Warwick and Worcester Company* if there had been nothing more in the case, they have, by suing the canal companies for the 10,000*l.*, adopted and ratified the transaction, and recovered the money as their own. They cannot, therefore, now be heard to say, when they have what is substantially the money in their pockets, or when they have had it applied in payment of their debts (which is the same thing), that they can avoid repayment of it to its rightful owner. If they had repudiated the act of their directors, the *Warwick and Worcester Company* might have sued for the money and recovered it. The decision in *Bryson v. The Warwick and Birmingham Canal Company* (a) is indeed, in substance, an express authority for the present claim, for that case proceeds upon the principle that the canal companies, after taking the benefit of the borrowed monies, could not disavow the illegal act of their directors in taking the deposit, but were bound to pay the money out of their own pockets.

With respect to the other Defendants, as they were directors of the *Warwick and Worcester Company* and misapplied

(a) 4 *De G., M. & G.* 711.

misapplied its monies, they are also liable to make them good.

Mr. Selwyn and **Mr. De Gex**, for the official manager of the *Extension Company*.

First, the Plaintiff has no right to sue in respect of this demand, for that company, if it had not been wound up, could not have sued for it; 11 & 12 Vict. c. 48, s. 50; *In re Weiss* (a); *Official Manager of the Grand Trunk Canal Company v. Brodie* (b).

Secondly, *Bryson v. The Warwick and Birmingham Canal Company* is no authority in support of the Plaintiff's claim. The Defendants there were incorporated companies who were capable of becoming liable in respect of monies received by their directors belonging to others, whereas the *Extension Company* was in fact not a company at all, but an association of persons who could not be bound by any such transaction; 7 & 8 Vict. c. 110, ss. 23, 25; *Burmester v. Norris* (c).

Thirdly, as to the argument that the institution of that suit was a ratification of the directors' act, the rights of the parties must be now exactly what they were at the date of the winding-up order. If the contributors to the *Extension Company* were not then liable to pay this claim, they cannot have become so since. If the money ordered to be paid by the canal companies to the *Extension Company* did not belong to that company, the decree was wrong, and will not prevent those to whom the money belongs from recovering it over again. The *Warwick and Worcester Company* were no parties to the suit, and cannot be bound or prejudiced by it. [The LORD JUSTICE KNIGHT BRUCE asked whether the case of the

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| (a) 15 C. B. 331. | M. & G. 146. |
| (b) 9 Hare, 823; 3 De G., | (c) 6 Exch. 796. |

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present Plaintiff was not in substance that *Bryson*, or the official manager of the *Extension Company*, was a trustee for the *Warwick and Worcester Company*.] This is not the frame of suit in which such a case can be set up. There should, for that purpose, have been a bill seeking to have the official manager of the *Extension Company* declared a trustee of this specific money. If that, however, had been the frame of the bill, it would have been as easily answered as it is in its present state, for it would be impossible, after allowing a Plaintiff claiming beneficially to incur the risk and expense of a suit which might have terminated adversely to him, for a stranger to it to claim the benefit of the success without participating in the risk. It is however sufficient to say that this bill is not so framed. It treats the case as one of debtor and creditor, and of ratification. It must have been considered that the other view was unsustainable, because the omission to set up a case of trust must have been deliberate, the point having been suggested and discussed when the appeal motion was heard, and when that motion was ordered to stand over to give an opportunity to institute this suit.

[*The LORD JUSTICE KNIGHT BRUCE* called the attention of counsel to the parts of the evidence as to the tracing and identification of the monies. His Lordship referred to *Small v. Attwood (a)*; *Pennell v. Deffell (b)*.]

Such a case is not set up by the bill, and if it had been the evidence would not support it. In *Pennell v. Deffell (b)*, the balances there in question were composed entirely of monies belonging to the trust, and of the official assignee's own monies. It was the case of a trustee mixing his own money with money held by him in trust. The question was, how sums drawn out generally,

(a) *Younge*, 407.

(b) 4 *De G. M. & G.* 372.

generally, from the mixed account for the official assignee's private purposes, were to be treated. One of your Lordships said, "Let it be imagined that in the second case supposed, Mr. *Green*, after mixing the known amount of money of his own with the trust monies, had taken from the repository a sum for his own private purposes, and it could not be ascertained whether in fact the specific coins and notes forming it included or consisted of those or any of those which were, in every sense, his own specifically; what would be the consequence? I apprehend that, in equity at least, if not at law also, what he so took would be solely or primarily ascribed to those contents of the repository which were in every sense his own. He would, in the absence of evidence that he intended a wrong, be deemed to have intended and done what was right, and if the act could not in that way be wholly justified, it would be deemed to have been just to the utmost amount possible."

That authority, if it has any application to this case, is in our favor. There was on the 15th of *October*, a balance of 1,250*l.* 13*s.* 6*d.* to the *Extension Company's* credit arising entirely from their own monies. On that day it is true 5,000*l.* was paid to its credit by the other company, making 6,250*l.* 13*s.* 6*d.* in all. But before the 22nd of *October* sums amounting to 2,058*l.* 15*s.* were drawn out, not for purposes of the *Extension Company*, but for unauthorized purposes, probably not intended more for the benefit of one company than of the other, and 1,242*l.* 3*s.* 9*d.* was drawn out for proper purposes, leaving the balance of 2,951*l.* 1*s.* 3*d.* on the morning of the 22nd. The probable and correct mode of ascribing payments in this case therefore, according to the principle laid down in the authority to which we have referred of *Pennell v. Deffell* (a), would be to ascribe the 2,058*l.* 15*s.* to a

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portion of the 5,000*l.* But the whole amount traced into the hands of the canal companies is 10,000*l.*, all of which, and more, was repaid in *February, 1846*, to the *Warwick and Worcester Company*. Even if that company were entitled to appropriate part of the 14,200*l.*, repaid to them in payment of a portion of the 5,000*l.*, they could not appropriate it to the repayment of the 2,058*l. 15s.* which had been applied for improper purposes, and if they could not, the whole of their demand would have been 14,941*l. 5s.*, leaving only a claim on the fund in the hands of the canal companies to the extent of 741*l. 5s.* Now the accounts have not yet been taken with reference to this point, and when they are they will show that this sum has been repaid, in addition to the repayment of 14,200*l.*, so that before the institution of *Bryson's* suit, the *Warwick and Worcester Company* had ceased to have, if they ever had, a claim to any part of the 10,000*l.* in the hands of the canal companies. Suppose, however, that the *Warwick and Worcester Company* were entitled to charge the whole 17,000*l.* against the *Extension Company*, and to appropriate the payment of 14,200*l.* in the most advantageous way to themselves, and irrespectively of the law equity and justice of the case, still there was at the utmost when Mr. *Bryson's* suit was instituted 2,800*l.* of the 10,000*l.* belonging to them. The balance, therefore, clearly belonged to the *Extension Company*, who have not in fact realised so much by those proceedings, which they took for their own protection and at their own risk, the *Warwick and Worcester Company* making no effort to recover the portion which it is suggested, they may now claim as specifically belonging to them. It is not a case of a charge or lien. The case, if maintainable, would have been that the fund, as to part, belonged specifically to one set of subscribers, and as to part to another.

other. But, in such a case, if either could claim their own share in full to the prejudice of the other, it certainly ought not to be that body of subscribers who incurred no risk in the recovery of the fund. Why are the *Extension Company*, who ran the risk of recovering the fund, to be paid a small dividend on their 7,300*l.* and the *Warwick and Worcester Company*, who took no step and incurred no risk or trouble, to be paid twenty shillings in the pound? But in truth the fund has never been specifically recovered. Mr. *Heath* bought the claim of the *Extension Company* for 7,300*l.* If the *Warwick and Worcester Company* is entitled to any part of it they can recover that part from Mr. *Heath*, or from the canal companies. We submit, therefore, that the argument as to identification, if it had been set up, would have been unsustainable.

At all events, and whether the claim be treated as one of identification or of debt, the length of time, and change of circumstances since the original transaction occurred, have been so great that much more injustice than justice would be occasioned by acceding to it, even if the claim had been originally well founded. Indeed, if the claim is treated as a debt as it is put by the bill, it is barred by the Statute of Limitations.

They referred to *Thorndike v. Hunt* (*a*).

Mr. *Bacon* and Mr. *Yool* for one of the directors.

Mr. *Malins* and Mr. *Roxburgh* for another.

Mr. *Glasse* in reply.

Judgment reserved.

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(*a*) 3 *De G. & J.* 563.

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The Lord Justice Knight Bruce.

By an order of the Court of Chancery, dated the 26th *May*, 1849, a provisionally registered company or association styled the "*The Warwick and Worcester Railway Company*" was, under the act relating to such subjects, passed in the year 1848, ordered to be wound up.

By another order of the Court of Chancery, bearing the same date, another provisionally registered company or association styled "*The London and Birmingham Extension and Northampton, Daventry, Leamington and Warwick Railway Company*," was under the same statute also ordered to be wound up.

Various proceedings have taken place under each order.

The Plaintiff in this cause is under the former order the official manager of the former company, and sues in that character. The Defendant, Mr. *Henry Croysdill*, is under the other order the official manager of the other company, and is sued in that character. The object of the suit is to recover (with interest) the amount remaining unpaid (namely 2,800*l.*) of a sum of 17,000*l.*, which, in the year 1845, was, by way of loan from the company now represented by the Plaintiff to the company now represented by the Defendant Mr. *Croysdill*, transferred to the funds of his company from the funds of the Plaintiff's company. The loan was irregular, and a wilful breach of trust on the part of those who personally participated in it; and the money, therefore, remained in equity the property of the Plaintiff's company. But of the amount so lent, the sum of 14,200*l.* has, I repeat, been repaid. It is proved that a sum of 10,000*l.*, part specifically

specifically of the 17,000*l.*, was advanced from the funds of Mr. *Croysdill's* company to two canal companies, though irregularly and by breach of trust so advanced, and the 10,000*l.* became accordingly a debt to Mr. *Croysdill's* company, or the other railway company, or both, from the two canal companies, which were the *Warwick and Birmingham Canal Company* and the *Warwick and Napton Canal Company*.

I will now read the 36th, 37th, 38th and 39th paragraphs of the bill in this cause, filed on the 20th *May*, 1859. They are thus—[His Lordship read them to the effect above set out.]

The allegations contained in these four paragraphs are substantially accurate and true. The amount received by Mr. *Croysdill*, as mentioned in the 39th paragraph, is after every proper deduction for costs and expenses, much more than sufficient to answer the amount of 2,800*l.* remaining due, as I have said, to the Plaintiff in the cause now before us, with the interest properly payable in respect of it; and accordingly his right in equity to recover so much from Mr. *Croysdill* or his company, which, as I have said, is the object of the present suit, seems to me established; the Plaintiff being, I think, entitled to follow the 10,000*l.*, which was specifically the money of his company,—as part of the 17,000*l.*, of which that company was deprived by a breach of trust—the 10,000*l.* having also found its way into the funds of the canal companies by another breach of trust.

It was not necessary, I conceive, to make the Defendant Mr. *Edlin* or the Defendant Mr. *Weiss* a party to this cause. But they were as directors or committee-men connected with the transaction as to the 17,000*l.*, and

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though dismissed may, I think, properly be so without costs.

I may, before concluding, observe that the case of Mr. *Croysdill* is clearly, in my judgment, not assisted by any statute of limitations, or by lapse of time; the Plaintiff being entitled, as I conceive, to treat the suit of 1850 as instituted, and the decree of *June*, 1853, as made for his benefit or that of his company, as well as for Mr. *Croysdill's* benefit or that of Mr. *Croysdill's* company.

The LORD JUSTICE TURNER.

This case came before us for hearing in the first instance at the request of the parties.

The Plaintiff in the suit is the official manager of a defunct company called the *Warwick and Worcester Railway Company*. The Defendants are two of the persons who constituted with others the finance committee of that company, and the official manager of another defunct company called the *London and Birmingham Extension Railway Company*, and the suit is instituted for recovering the sum of 2,800*l.*, the monies of the former company paid over to the latter company.

This sum of 2,800*l.* is the balance of a sum of 17,000*l.*, which was drawn from the account of the former company with the *Commercial Bank of London*, by two cheques for the sums of 5,000*l.* and 12,000*l.*, which were respectively signed by the Defendants, who were members of the finance committee of that company, and each having signed one of the cheques, and by other members of that committee, and were dated respectively the 15th and 22nd *October*, 1845, and which sums were on those days

days placed to the credit of the account of the latter company with the same bank, after deducting from the sum of 17,000*l.* the sum of 14,200*l.*, repaid by the latter company to the former company on the 3rd *February*, 1846.

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The members of the finance committee of each of these companies were the same persons, and each of the companies had the same directors, except that there were two directors of the latter company who were not directors of the former company.

On the 22nd *October*, 1845, the sum of 10,000*l.*, part of the monies then standing to the account of the latter company with the *Commercial Bank*, was applied by that company in payment of the deposit upon the purchase by them of the *Warwick* and *Birmingham* and *Warwick* and *Napton* canals, and it is, I think, satisfactorily established by the evidence in the cause, that the sum of 10,000*l.*, thus applied by the latter company, was part of the sums of 5,000*l.* and 12,000*l.* which had, as above mentioned, been transferred to their account from the account of the former company.

In the year 1849 orders were made for winding up both the companies.

In the month of *May*, 1850, a suit was instituted in this Court by one of the shareholders of the latter company, on behalf of himself and all other the shareholders of that company, to compel the repayment of the 10,000*l.*, which had been paid to the canal companies, the latter company having had no power to purchase the canals; and by a decree of his Honor the Vice-Chancellor Sir *John Stnart*, dated the 23rd *June*, 1853, and which was affirmed by us on the 22nd *December*, 1853,  
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it was ordered, that the 10,000*l.* should be repaid by the canal companies to the official manager of the latter company. The official manager of that company was, it appears, unable to recover from the canal companies the whole sum which was payable to him under this decree; but he sold and assigned the benefit of the decree and of the sum which was payable under it to a Mr. *Heath* for the sum of 7,300*l.*, which was agreed to be paid and was paid to him accordingly; and it appears by the evidence in this cause, that this sum of 7,300*l.* has, at all events to an extent exceeding the sum of 2,800*l.* sought to be recovered in this suit, been applied for the purposes of the latter company.

These are all the facts of the case which appear to me to be material to be stated.

The question to be determined is, whether, under these circumstances, the Plaintiff, the official manager of the *Warwick and Worcester Company*, is entitled to recover the 2,800*l.* and interest; and I am of opinion that he is so entitled.

It was not disputed, and cannot be denied, that the monies which stood to the account of the *Warwick and Worcester Company* with the *Commercial Bank* were monies which belonged to that company and were held in trust for their shareholders; nor was it disputed, nor can it be denied, that the payment over of these monies to the *London and Birmingham Company* was not in any manner justifiable. The one company had no power to make the loan—the other had no power to accept it. The whole transaction was a breach of trust, and the *London and Birmingham Company* had, through their directors and their finance committee, notice that it was so.

It

It was said indeed that these monies were paid over in anticipation of the two companies being amalgamated; but there was not even authority to make the amalgamation; and, under these circumstances, the monies, when paid over to the *London and Birmingham Company*, were affected in their hands with the trusts to which they were originally subject.

Whether the 10,000*l.*, the part of these monies which was paid over to the canal companies, could have been followed into their hands it is not, as I think, necessary for us to consider. That transaction has been undone, and the 7,300*l.* which has been received in respect of it must, as I apprehend, be taken to represent the 10,000*l.*

It was argued for the Defendants, that the shareholders of the *London and Birmingham Company* had a right to consider the 10,000*l.* paid to the canal companies as their own proper monies, and were, therefore, entitled to receive and retain the 7,300*l.* But the answer to this argument is, that the 7,300*l.*, being the fruit of trust money, must be subject to the trust which attached to the money of which it was the fruit, and the *London and Birmingham Company*, therefore, when the 7,300*l.* came to their hands, must be taken to have held it affected with a trust for the benefit of the *Warwick and Worcester Company*.

A further argument in support of the Defendant's case was attempted to be raised, upon the ground that the 14,200*l.* repaid by the *London and Birmingham Company* to the *Warwick and Worcester Company* exceeded, as it was said, the amount of the monies received from that company, of which the shareholders of the *London and Birmingham Company* had had the benefit, the directors of that company having, as it was alleged, misapplied

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applied the monies received by them. But this does not appear to me to affect the question before us, for the *Warwick and Worcester Company* had, as I apprehend, a right to apply the monies which were repaid to them to such portion of the debt which was due to them as they might think fit, and the shareholders in the *London and Birmingham Company* have received the benefit of the 7,300*l.* to an amount exceeding the monies now sought to be recovered.

It was attempted also on the part of the Defendants to resist the Plaintiff's claim upon the ground of the Statute of Limitations, but the Plaintiff's case does not rest upon the mere claim of debt. It proceeds upon the right to recover monies affected by a trust which have got into the hands of other persons with notice of the trust, and in truth the case before us is no more than this,—that if a trustee, lending trust monies in breach of the trust, and the borrower, with notice of the trust, applying the monies to his own use, in which case the conscience of the borrower being affected by the trust, he cannot, as I apprehend, be permitted to separate the loan from the trust, and insist that the loan being barred by the statute the trust is barred also.

This case, too, is strengthened by the fact that the trust monies have come back to the Defendants within the statutable period.

It was further urged on the part of the Defendants that the Plaintiff cannot be considered as representing the company in right of which he sues, and it was attempted to support the argument on that point by the case of *Pritchard v. Official Manager of the London and Birmingham Railway Company* (a), but that case does

(a) 15 C. B. 331.

does not seem to me to apply. It proceeded upon the ground that it was not a case in which an action could be maintained against the company ; but here, the company having got the trust monies, there is no doubt they may be sued, and it is clear that under the Winding-up Acts the Plaintiff is the proper person to institute the suit.

Upon the whole, therefore, I think there must be a decree against the company for the  $2,800l.$ , with interest at  $4l.$  per cent. from the time when they received the  $7,300l.$ , and with costs ; but, in the present state of the record, I cannot see my way to make any decree against the other Defendants without further inquiry, which would only involve the parties in unnecessary expense.

I think, therefore, that unless the Plaintiff insists upon further inquiry, the bill should be dismissed against those Defendants ; but as their conduct has led to the necessity for these proceedings, I think it should be dismissed against them without costs.

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*June 6, 20.
July 4.*

Before *The
Lord
Chancellor
Lord
Campbell.*

Where the Plaintiff, by his bill, seeking to charge the Defendant as constructive trustee of the lease of a farm of which he had been in the occupation, prayed for an account of the profits made and received by the Defendant in carrying on the farming business, and offered to allow the Defendant, on taking such account, all such sums as had been advanced by the Defendant and were due to him for stock supplied for carrying on the farming

business:—*Held*, that the Plaintiff was not at liberty to revoke this offer at the hearing, and instead of an account of profits to claim an occupation rent, merely by reason of a statement in the Defendant's answer, that while the Defendant had held the farm no profits had been made.

The ordinary direction in a decree that “any of the parties are to be at liberty to apply to the Court as they shall be advised,” *Held* not to extend to an application by the Plaintiff to be allowed costs, as to which there was no express direction given by the decree.

KENDALL v. MARSTERS.

THIS was an appeal from part of the decree pronounced by Vice-Chancellor *Stuart* on the 21st July, 1859, under the circumstances following:—

Anna Maria Kendall and *George Middleton*, her son-in-law and co-partner in the business of farming, were, at the respective dates of her will and of her death, in the occupation of a farm called *Sherborne Hall Farm*, under a lease granted by the Master, Fellows and Scholars of *Emmanuel College, Cambridge*, to *Anna Maria Kendall* for twelve years. By her will, dated the 16th October, 1854, *Anna Maria Kendall* appointed the Defendant *Marsters* and another her executors, and, among other things, gave and bequeathed to them all her interest in the lease and occupation of her then dwelling-house and farm called *Sherborne Hall Farm*, in *Norfolk*, and in the live and dead farming stock and implements of husbandry used thereon, upon trust to conduct, manage and carry on the farm in such manner and for such time as they should think proper; but nevertheless for and on account and for the sole use and benefit of her son (the Plaintiff) and to pay or permit him from time to time to receive the profits, after deducting the expenses.

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The testatrix died in *February*, 1855, and from her death, until the expiration of the lease on the 10th *October*, 1856, the business of the farm was managed by the executors and *George Middleton*, and one moiety of the net profits paid or accounted for to the Plaintiff. On the 29th *September*, 1856, the whole of the stock on the farm was sold by auction, and was purchased by the Defendant for the benefit of the Plaintiff, who intended to carry on the business of the farm, *Middleton* receiving the value of his moiety out of the purchase-money. After some correspondence between the Plaintiff and the Defendant, and between both and the lessors, a new lease of the farm was granted to the Defendant on the 8th *March*, 1857, for a term of eight years from the 10th *October*, 1856.

The bill prayed, first, that the Defendant might be declared to be a trustee for the Plaintiff of the lease, and might be ordered to deliver up to the Plaintiff the farm and premises comprised in such lease; the Plaintiff offering to accept an assignment of the lease in case the College should assent to the execution of an assignment, and also offering to enter into all proper covenants for the indemnity of the Defendant against the rent and covenants reserved and contained in the lease. Secondly, that an account might be taken of the profits made by the Defendant in carrying on the business of the farm since the death of the testatrix, and which had been received by the Defendant, the Plaintiff offering to allow the Defendant, on taking the account, all such sums as had been advanced by the Defendant, or as were then due to him for stock supplied for the carrying on the farming business, and to pay to Defendant what, if anything, should be found due to him on taking the account; and thirdly, that the Defendant might be ordered to pay to Plaintiff his costs of suit.

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The Defendant, by his answer, denied that he was a trustee of the farm for the Plaintiff, and stated that the farm could not be carried on under the lease except at a loss ; that he had made no profit in carrying on the business of the farm since the 10th *October*, 1857, from which time alone he had carried on the farming business, and that since that date he had from time to time expressed to the Plaintiff, and the Plaintiff's friends, his willingness to give up the lease of the 8th *March*, 1857, if the Plaintiff would repay the money expended in stocking and carrying on the farm since the 10th *October*, 1857, with interest. The answer did not furnish any accounts, nor any schedule of account books and documents.

The Defendant made an affidavit, stating that not only had he made no profits in carrying on the farming business, but that he had, on the contrary, in one year, sustained losses to the amount of 1,200*l.*

At the hearing of the cause, the Plaintiff insisted that it was competent to him to waive the account of profits made by the Defendant prayed by the bill, and asked for a decree directing the Defendant to execute an assignment of the lease, the Plaintiff offering to pay any expense incurred by the Defendant in respect of the lease, and that the Defendant might be ordered to give up possession of the farm, and to pay to Plaintiff an occupation rent in respect of his tenancy since the 10th *October*, 1857.

The Vice-Chancellor, by the decree under appeal, declared that the Defendant was a trustee of the lease for the Plaintiff, and directed that the Plaintiff's costs, up to the hearing, should be paid by the Defendant, and that the following accounts should be taken. First, an account of

of all monies properly advanced and expended by the Defendant in stocking or carrying on or otherwise in managing the farm, including the costs incurred by him in relation to the lease ; and secondly, an account of all monies received by the Defendant on account or in respect of the farm ; and the decree went on to direct that what, on taking such account, should be found due from the Plaintiff, should be, within two months from the date of the Chief Clerk's Certificate, paid by the Plaintiff to the Defendant, and, in default, that the Plaintiff's bill should stand dismissed with costs subsequent to the hearing ; and that, on payment of what, if anything, should be found due from the Plaintiff to the Defendant being made by the Plaintiff, the Defendant should give up possession of the farm and all the stock and crops thereon, and assign the lease, with the consent of the College, to the Plaintiff at the Plaintiff's expense ; but, in case the College should refuse to consent to the transfer of the lease, then that the Plaintiff should indemnify the Defendant in respect of the rent and covenants of the lease.

The appeal was against that part of the decree directing the accounts and the consequential relief.

Mr. Daniel and Mr. Jolliffe for the Appellant.

The bill in this case was filed on the assumption that the Defendant was a trustee of the new lease for the Plaintiff—and on that assumption the Plaintiff was entitled to claim either an account of profits or an occupation rent ; *Heathcote v. Hulme* (*a*) ; *Docker v. Somes* (*b*). There having been an annual profit made in carrying on the farm under the old lease, the inference was, that the same state of things had continued under

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(*a*) 1 *Jac. & Wal.* 122.

(*b*) 2 *Myl. & K.* 655.

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the new lease. The Plaintiff therefore elected to claim an account of profits, offering to make to the Defendant all just allowances for what he had expended in carrying on the business. At the hearing, however, the Plaintiff became, for the first time, aware that such an account can only result in loss. It is submitted, therefore, that it is not too late for him to waive the account of profits and withdraw the offer of just allowances, and elect to charge the Defendant with an occupation rent. It is entirely in the discretion of the Court whether it will hold the Plaintiff to the offer made by his bill; *Knight v. Bowyer* (*a*) ; and it is submitted that, under all the circumstances of the present case, it will not. The present case is a clear one for the application of the rule, that a trustee who occupies trust premises for his own benefit is to bear the loss thereby sustained.

Mr. *Rolt* and Mr. *Batten* for the Defendant.

The express trust in this case came to an end at the expiration of the original lease—and the Defendant, therefore, can only be charged as a constructive trustee. Where a constructive trustee has been charged for a breach of trust, he has always been held entitled to just allowances, and that even where his conduct had been marked with mala fides ; *Brown v. De Tastet* (*b*). The denial of the trust can affect only the question of costs. They cited also *Austin v. Chambers* (*c*) ; *Pride v. Fooks* (*d*).

Mr. *Daniel* in reply.

We do not dispute the right of the Defendant to just allowances in respect of expenditure bonâ fide made by him

(*a*) 2 *De G. & J.* 421.

(*b*) *Jac.* 284.

(*c*) *Dru.* 85.

(*d*) 2 *Beav.* 430.

trustee for the purposes of the estate ; but the evidence shows that during the period in which are alleged to have been incurred, the s not acting as a bona fide trustee would here a trustee has thought proper to st, and then, after it has been established , against him, turns round and insists that the upation which he has claimed for his own benefit has resulted in loss, the cestui que trust, when the trust has thus been established, has a right to ask for an inquiry whether the trust business has been carried on at a loss, and in the event of the inquiry showing a loss, to abandon the account of profits and claim the restoration of the trust property in the same condition as it was in when the trust commenced.

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Judgment reserved.

*The LORD CHANCELLOR.*

The decree in this case declares that the Defendant is a trustee for the Plaintiff of the lease of a farm granted to the Defendant which he had taken possession of and had managed for his own benefit, awards costs to the Plaintiff up to the hearing, and directs the following accounts to be taken :—

July 4.

“ An account of all monies properly advanced and expended by the Defendant in stocking and carrying on, or otherwise in managing, the said farm, including the costs incurred by him in relation to the said lease,” and “ an account of all monies received by the Defendant on account or in respect of the said farm.”

This

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it was ordered, that the 10,000*l.* should be repaid by the canal companies to the official manager of the latter company. The official manager of that company was, it appears, unable to recover from the canal companies the whole sum which was payable to him under this decree; but he sold and assigned the benefit of the decree and of the sum which was payable under it to a Mr. *Heath* for the sum of 7,300*l.*, which was agreed to be paid and was paid to him accordingly; and it appears by the evidence in this cause, that this sum of 7,300*l.* has, at all events to an extent exceeding the sum of 2,800*l.* sought to be recovered in this suit, been applied for the purposes of the latter company.

These are all the facts of the case which appear to me to be material to be stated.

The question to be determined is, whether, under these circumstances, the Plaintiff, the official manager of the *Warwick and Worcester Company*, is entitled to recover the 2,800*l.* and interest; and I am of opinion that he is so entitled.

It was not disputed, and cannot be denied, that the monies which stood to the account of the *Warwick and Worcester Company* with the *Commercial Bank* were monies which belonged to that company and were held in trust for their shareholders; nor was it disputed, nor can it be denied, that the payment over of these monies to the *London and Birmingham Company* was not in any manner justifiable. The one company had no power to make the loan—the other had no power to accept it. The whole transaction was a breach of trust, and the *London and Birmingham Company* had, through their directors and their finance committee, notice that it was so.

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It was said indeed that these monies were paid over in anticipation of the two companies being amalgamated; but there was not even authority to make the amalgamation; and, under these circumstances, the monies, when paid over to the *London and Birmingham Company*, were affected in their hands with the trusts to which they were originally subject.

Whether the 10,000*l.*, the part of these monies which was paid over to the canal companies, could have been followed into their hands it is not, as I think, necessary for us to consider. That transaction has been undone, and the 7,300*l.* which has been received in respect of it must, as I apprehend, be taken to represent the 10,000*l.*

It was argued for the Defendants, that the shareholders of the *London and Birmingham Company* had a right to consider the 10,000*l.* paid to the canal companies as their own proper monies, and were, therefore, entitled to receive and retain the 7,300*l.* But the answer to this argument is, that the 7,300*l.*, being the fruit of trust money, must be subject to the trust which attached to the money of which it was the fruit, and the *London and Birmingham Company*, therefore, when the 7,300*l.* came to their hands, must be taken to have held it affected with a trust for the benefit of the *Warwick and Worcester Company*.

A further argument in support of the Defendant's case was attempted to be raised, upon the ground that the 14,200*l.* repaid by the *London and Birmingham Company* to the *Warwick and Worcester Company* exceeded, as it was said, the amount of the monies received from that company, of which the shareholders of the *London and Birmingham Company* had had the benefit, the directors of that company having, as it was alleged, misapplied

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applied the monies received by them. But this does not appear to me to affect the question before us, for the *Warwick and Worcester Company* had, as I apprehend, a right to apply the monies which were repaid to them to such portion of the debt which was due to them as they might think fit, and the shareholders in the *London and Birmingham Company* have received the benefit of the 7,300*l.* to an amount exceeding the monies now sought to be recovered.

It was attempted also on the part of the Defendants to resist the Plaintiff's claim upon the ground of the Statute of Limitations, but the Plaintiff's case does not rest upon the mere claim of debt. It proceeds upon the right to recover monies affected by a trust which have got into the hands of other persons with notice of the trust, and in truth the case before us is no more than this,—that if a trustee, lending trust monies in breach of the trust, and the borrower, with notice of the trust, applying the monies to his own use, in which case the conscience of the borrower being affected by the trust, he cannot, as I apprehend, be permitted to separate the loan from the trust, and insist that the loan being barred by the statute of the trust is barred also.

This case, too, is strengthened by the fact that the trust monies have come back to the Defendants within the statutable period.

It was further urged on the part of the Defendants that the Plaintiff cannot be considered as representing the company in right of which he sues, and it was attempted to support the argument on that point by the case of *Pritchard v. Official Manager of the London and Birmingham Railway Company* (*a*), but that case does

(*a*) 15 C. B. 331.

does not seem to me to apply. It proceeded upon the ground that it was not a case in which an action could be maintained against the company; but here, the company having got the trust monies, there is no doubt they may be sued, and it is clear that under the Winding-up Acts the Plaintiff is the proper person to institute the suit.

Upon the whole, therefore, I think there must be a decree against the company for the  $2,800l.$ , with interest at  $4l.$  per cent. from the time when they received the  $7,300l.$ , and with costs; but, in the present state of the record, I cannot see my way to make any decree against the other Defendants without further inquiry, which would only involve the parties in unnecessary expense.

I think, therefore, that unless the Plaintiff insists upon further inquiry, the bill should be dismissed against those Defendants; but as their conduct has led to the necessity for these proceedings, I think it should be dismissed against them without costs.

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 TICES.*

A legacy of 5,000*l.* was bequeathed to trustees, upon trust to pay and apply so much of the interest as they in their uncontrolled discretion should think necessary or expedient, yearly, and every year from the time of the testator's decease until *A.* should at-

tain thirty-two, in aid of the allowance which *A.*'s father should or ought to make for that purpose, in order to prepare *A.* for his establishment in and to enable him to follow some profession or business, and subject thereto to accumulate the income of the 5,000*l.* until *A.* should attain thirty-two or die, whichever should first happen; and on *A.* attaining thirty-two years to pay the interest of the 5,000*l.* and of the accumulated fund arising therefrom to *A.* during his life, so long as he should not have been found bankrupt, or taken the benefit of the Insolvent Acts or have assigned his estate for the benefit of, or have compounded with, his creditors for payment of less than the debts due to them respectively; and subject to the trust above mentioned, the 5,000*l.* and the accumulated fund were to be held in trust for the child or children of *A.* in manner therein mentioned, with a gift over in default of a child or children becoming entitled under such trust.

A., soon after attaining his majority, became involved in debt, and in consequence unable to provide for his wife and infant child or to pursue any profession or business. The Court directed a portion of the fund which had arisen from accumulations of surplus income to be applied in payment of his debts.

Power of trustees to resort for future maintenance to accumulations of dividends which would, if required, have been applicable to past maintenance.

EDWARDS v. GROVE.

THIS petition of appeal from an order of Vice-Chancellor *Stuart* was heard, in the first instance, by the Lords Justices of Appeal, but their Lordships having differed, it was, at their request, placed in the paper for rehearing before the full Court.

The facts were as follows:—

William Lloyd, the testator in the cause, by his will, dated the 11th of September, 1841, gave 5,000*l.* to trustees, upon trust, until *Allen Lloyd Grove* should attain the age of thirty-two, or die, whichever should first happen, to pay and apply so much of the interest of the same sum of 5,000*l.* as the trustees or trustee might, in their or his own discretion, and without being subject to any sort of control or interference in the exercise of that discretion, think necessary or expedient,

yearly

and on *A.* attaining thirty-two years to pay the interest of the 5,000*l.* and of the accumulated fund arising therefrom to *A.* during his life, so long as he should not have been found bankrupt, or taken the benefit of the Insolvent Acts or have assigned his estate for the benefit of, or have compounded with, his creditors for payment of less than the debts due to them respectively; and subject to the trust above mentioned, the 5,000*l.* and the accumulated fund were to be held in trust for the child or children of *A.* in manner therein mentioned, with a gift over in default of a child or children becoming entitled under such trust.

A., soon after attaining his majority, became involved in debt, and in consequence unable to provide for his wife and infant child or to pursue any profession or business. The Court directed a portion of the fund which had arisen from accumulations of surplus income to be applied in payment of his debts.

Power of trustees to resort for future maintenance to accumulations of dividends which would, if required, have been applicable to past maintenance.

yearly and every year from the time of his (the testator's) decease until *Allen Lloyd Grove* should attain his said age of thirty-two years, in aid of the allowance which *James Thomas Grove* (the father of *Allen Lloyd Grove*) should or might make for that purpose, in order to prepare *Allen Lloyd Grove* for his establishment in, and to enable him to follow, some profession, business or occupation, or any pursuit in life that he might think fit to adopt; and, subject thereto, the trustees or trustee, until *Allen Lloyd Grove* should attain the age of thirty-two years or die, whichever should first happen, were to accumulate the income of the same sum of 5,000*l.* by way of compound interest; and when and so soon as *Allen Lloyd Grove* should attain the age of thirty-two years, to pay the interest of the same sum of 5,000*l.*, and of the accumulated fund arising therefrom, to, or permit the same to be received by, *Allen Lloyd Grove* so long during his life as he should not have been duly found and declared bankrupt within the intent and meaning of any statute or statutes passed or to be passed in relation to bankrupts, or have taken the benefit of any act or acts of parliament passed or to be passed for the relief of insolvent debtors, or have made any conveyance or assignment of his estate or effects for the general benefit of his creditors, or have made a composition with his creditors for the payment of less than the debts due to them respectively. And, subject to the trusts aforesaid, the same sum and accumulated fund, and the interest thereof, were, at whatever age *Allen Lloyd Grove* might die, to be held in trust for the children, or child if only one, of *Allen Lloyd Grove* as therein mentioned. And if there should be no child of *Allen Lloyd Grove* who should become entitled under the trusts and powers before mentioned, then upon trusts, but subject and without prejudice to the trusts and powers aforesaid, for *Mary Ann Pratt* and her husband and children.

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The testator also devised and bequeathed the residue of his property to the same trustees upon trusts (after conversion) similar to those previously declared of the said legacy of 5,000*l.*

The testator died on the 2nd of *June*, 1842. His will was proved by *T. L. Edwards*, one of the trustees, alone, who invested the sum of 5,000*l.* in the purchase, in his own name, of 5,404*l.* 18*s.* 6*d.* £3 Bank Annuities upon the trusts declared in the will of the legacy of 5,000*l.*

A suit for the administration of the testator's estate having been afterwards instituted, the Chief Clerk, by his certificate made therein, dated the 7th of *April*, 1854, found that *James Thomas Grove* died on the 13th of *August*, 1849, leaving *Allen Lloyd Grove* his infant son and only child, and having by his will appointed *J. T. Jenkins* executor of his will and guardian of his child.

Allen Lloyd Grove attained the age of twenty-one years on the 19th of *February*, 1857.

On the 28th of *June*, 1858, *Allen Lloyd Grove* presented a petition in the cause, stating to the above effect, and also that the Petitioner was articled to *J. T. Jenkins* in *February*, 1855, and remained with him as articled clerk about two years, when, having taken a dislike to the profession of the law, the Petitioner determined to adopt the theatrical profession. The petition further stated, that the Petitioner was maintained and educated during his minority, and since his late father's decease, by means of property to which he became entitled under the will of his late father, but that the property to which he so became entitled, except a small leasehold house at *Swansea*, supposed to be worth 60*l.* but unsold at the date of the petition, was exhausted some time previously

previously to the year 1857, and that the Petitioner had not any means of support except the income of the said legacy of 5,000*l.* and of the residuary real and personal estate of the testator, given as above-mentioned in trust for the Petitioner; that no part of such income had yet been paid to the Petitioner; that for some time past he had been under the necessity of contracting debts for his necessary support and maintenance, and for enabling him to fit himself out and properly pursue the theatrical profession; and that since the month of *October*, 1857, he had been, and was still, confined in the Queen's Prison at the suit of the largest of his creditors, but had not been found or declared bankrupt within the intent and meaning of any statute or statutes passed in relation to bankrupts, or taken the benefit of any act or acts of parliament passed for the relief of insolvent debtors, or made any conveyance or assignment of his estate and effects for the general benefit of his creditors, or made any compromise with them for the payment of less than the debts due to them respectively. The petition further stated that *T. L. Edwards*, the surviving trustee, died in *January*, 1858, and that the suit was revived; that the sum of 8,626*l.* 18*s.* 6*d.* £3 per Cent. Consolidated Bank Annuities was then standing in the name of the Accountant-General to the credit of the said causes, "The Account of the Legacy of 5,000*l.* for the Benefit of *Allen Lloyd Grove* and his issue and others in remainder," which sum consisted of the 5,404*l.* 18*s.* 6*d.* like annuities, wherein the said trust sum of 5,000*l.* had been invested, and further purchases with the accumulation of dividends; that 2,129*l.* 1*s.* 6*d.* £3 per Cent. Consolidated Bank Annuities was standing in trust in the causes "To the Account of the Residuary Estate of the Testator subject to Legacy Duty," such sum consisting partly of capital of the residuary estate, and partly of the accumulations of the dividends made from time to time and invested; that

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that the annual dividends of the 8,626*l.* 18*s.* 6*d.* stock amounted to 256*l.* 16*s.*; that the income of the testator's residuary personal estate, including the dividends on the above sum invested, amounted to 70*l.*, and that the Petitioner was then in want of the sum of 1,800*l.* to satisfy his debts and liabilities, and to enable him properly to pursue his profession.

The prayer was that the costs of the petition might be taxed as between solicitor and client, and that so much of the 8,626*l.* 18*s.* 6*d.* stock might be sold as would be sufficient to pay the costs, and the above-mentioned sum of 1,800*l.*, and that the proceeds might be applied accordingly; and that the interest, dividends and income of the other residuary estate remaining unsold, might be ordered to be paid to the Petitioner till further order.

On 2nd *July*, 1858, Vice-Chancellor *Stuart*, on hearing the petition, ordered so much of the 8,626*l.* 15*s.* 6*d.* stock as would raise 500*l.* to be sold, and the money to arise from such sale to be paid to Mr. *Charles Cutler*, the Petitioner's solicitor, he undertaking to apply so much thereof as might be necessary to liberate the Petitioner from prison, and to account for the residue thereof: and ordered the rest of the petition to stand over, and that *J. T. Jenkins* should be served with a copy of the petition. The sum of 500*l.* was accordingly raised, and part thereof applied by Mr. *Cutler* in liberating the Petitioner from prison.

By an order made on a further hearing of the petition, dated the 9th *July*, 1858, it was ordered, that Mr. *Cutler* should pay unto the Petitioner the surplus, remaining in the hands of Mr. *Cutler* of the 500*l.* paid to him under the order of 2nd *July*, after paying so much thereof as had been necessary for the purposes referred to in the order,

order, and an inquiry was directed as to the age of the Petitioner and the nature and amount of his fortune, and whether anything and what would be proper to be allowed for his maintenance for the time past and the time to come, or for his establishment in, or to enable him to follow, some profession, business or occupation, or any pursuit in life that he might think fit to adopt, until he should attain the age of thirty-two years, out of the dividends of the 8,101*l.* 19*s.* 11*d.* stock, which then represented the fund arising from the legacy of 5,000*l.* and accumulations derived from it, or out of such part of the above sum as might have arisen from interest on the 5,000*l.* bequeathed to the Petitioner, and that the petition should stand adjourned till the result of such inquiry had been certified.

On the 24th *November*, 1858, a stop order was placed on the trust funds in Court by a creditor of the Petitioner, named *R. H. Burne*.

The Chief Clerk, by his certificate, dated 23rd *December*, 1858, certified that the Petitioner was then twenty-two years of age, and that his fortune, contingent on his attaining the age of thirty-two years, consisted of a life interest in 8,101*l.* 19*s.* 11*d.* Bank £3 per Cent. Consolidated Annuities and 126*l.* 14*s.* 2*d.* cash, then standing in the name of the Accountant-General to the credit of the said "Account of the Legacy of 5,000*l.* for the Benefit of *Allen Lloyd Grove* and his Issue and others in remainder," and of 2,161*l.* 13*s.* 11*d.* like annuities, then standing in the name of the Accountant-General to the credit of the cause "The Account of the Residuary Estate of the Testator, subject to Legacy Duty," and of the residue of the testator's real estate then remaining unsold, and of all accumulations that might arise on the Bank Annuities, cash and produce respectively;

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tively ; and that, having regard to the order of 2nd *July*, 1858, and the sums thereby directed to be raised, it would not be fit and proper that any further allowance should be made for the maintenance of the Petitioner for the time past, and to enable the Petitioner to follow the profession of an actor, which he intended to adopt, until he should attain the age of thirty-two years ; and that it was fit and proper that the whole income of the trust fund should be applied for his maintenance for the time to come until he should attain thirty-two.

On the 3rd *June*, 1859, another creditor of the Petitioner obtained a stop order.

The Petitioner afterwards moved that the certificate of the 23rd *December*, 1858, might be varied, so as to certify that a sufficient sum out of the 2,697*l.* 1*s.* 5*d.*, being that part of the 8,101*l.* 19*s.* 11*d.* £3 per Cent. Consolidated Bank Annuities which consisted of accumulations, and the future dividends, should be paid to the Petitioner for maintenance instead of being invested.

Upon this motion and on further hearing of the petition, it was ordered, that on the solicitor of the Petitioner undertaking to pay the weekly allowance of 1*l.* 10*s.* a week for the subsistence of the Petitioner, and to pay his debts at *Boulogne*, where he was then resident, and to produce him and his wife forthwith before the Judge in Chambers without prejudice to any question, the sum of 63*l.* 10*s.* 6*d.*, part of the sum of 94*l.* 3*s.* 5*d.* cash standing in the bank to the account of the residuary estate, and the sum of 364*l.* 14*s.* 2*d.*, part of 479*l.* 13*s.* 1*d.* cash standing in the bank to the credit of the legacy trust, respectively, should be paid to the solicitor, and that the petition and motion should in other respects stand over with liberty to apply.

By

By an order on further hearing of the petition and motion, dated 13th *February*, 1860, it was ordered, on the solicitor undertaking to continue the weekly allowance of 1*l.* 10*s.* a week for the subsistence of the Petitioner, and to produce him and his wife before the Judge in chambers forthwith, that 114*l.* 18*s.* 11*d.* cash, then in Court to the credit of the legacy account, and the interest to accrue on the whole fund standing in Court on the legacy account, be paid till further order to *Charles Edwards*, the Plaintiff (the executor of *J. T. Edwards*, the original trustee), to be applied by him in the maintenance of the Petitioner.

From this order the Petitioner *Allen Lloyd Grove* appealed.

The petition of appeal stated, that the *Boulogne* debts of the Petitioner had been paid by the solicitor, but that no other proceedings had been taken under the order appealed from; that the Petitioner was indebted to various persons in this country on claims amounting to 2,305*l.* 7*s.* 1*d.* and interest and costs; but that he believed some of such claims to be exorbitant and unfounded, and that there would be found to be really due from him in respect of such debts and liabilities, and interest and costs, a sum not exceeding 2,000*l.*; that the Petitioner, in consequence of the existence of such debts, was unable to appear in public, or follow any profession or occupation; that the Petitioner and his wife were in a weak state of health, and in constant need of medical attendance; that the Petitioner had issue only one child, *Allen Lloyd Grove* the younger, born 12th *May*, 1860; that there were then standing to the credit of the legacy account 8,101*l.* 19*s.* 11*d.* £3 per Cent. Consolidated Bank Annuities and 114*l.* 18*s.* 4*d.* cash, and to the account of the residue 2,161*l.* 13*s.* 8*d.* £3 per Cent. Consolidated Bank Annuities, and 30*l.* 13*s.* 5*d.* cash.

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The petition of appeal prayed that the order of 13th *February*, 1860, might be reversed, and that instead thereof it might be ordered that the costs of all parties should be taxed and paid, as between solicitor and client, out of the residuary trust fund; and that, out of the legacy fund, a sufficient sum might be raised to satisfy all the just debts and liabilities of the Petitioner; and that the sums of 114*l.* 18*s.* 11*d.* and 30*l.* 13*s.* 5*d.* cash, and all future dividends on the residue left standing to said respective accounts be paid to the Petitioner.

Mr. *Malins* and Mr. *Eddis* for the Appellant.

The accumulations upon the legacy fund amount to more than the sum asked for by the petition. Though there is no express power given to the trustees to apply the accumulation for past maintenance, such a power may be implied from the terms of the will. There is nothing on the face of this will which indicates an intention that at the moment when the surplus income in each year is invested, it is thenceforth irretrievably absorbed in the capital account, and to be considered as capital. It still remains liable to be treated as income, and may be allowed *nunc pro tunc* for past maintenance; *Carmichael v. Wilson* (*a*); *Fendall v. Nash* (*b*); *Evans v. Massey* (*c*). The case of *Ex parte M'Key* (*d*) would seem to be an authority against us, but that case is in effect overruled by the subsequent case of *Carmichael v. Wilson* (*a*). The present application is in substance an application for past maintenance, and, judging from the language used by the testator, is for a purpose which he would have approved of.

His

(*a*) 3 *Moll.* 84.

(*b*) 5 *Ves.* 197 *n.*

(*c*) 1 *Yor. & Jerv.* 196.

(*d*) 1 *Ball & Bea.* 405.

His object was accumulation, but not till all the requirements of the Petitioner had been answered.

Mr. Southgate for the infant child of the Petitioner.

Mr. J. H. Palmer and *Mr. Shebbeare*, for the persons entitled in remainder.

Upon the true construction of the will, the trustees, after allowing a sufficient sum for the Petitioner's maintenance or advancement in each year, were bound to capitalise the surplus, by way of accumulation. There is no express power to apply the surplus of one year to meet the demand for advancement or maintenance in any other year, past or present. Nor can such a power be implied. Supposing even that it could, to exercise it in the way asked by the petition, would not be for the benefit of the Petitioner, and in such a case the power ought not to be exercised; *Errat v. Barlow* (a).

Mr. Surrage for the trustee of the will.

Mr. Welford, *Mr. Osborne Morgan*, *Mr. W. Morris* and *Mr. Dryden* for various creditors.

The LORD CHANCELLOR.

Two questions arise in this case, first, whether under this will there is the power to apply any portion of this accumulated fund for the purpose proposed by the petition; and, secondly, if there is such a power, whether the Court should exercise its discretion by directing the sum asked by the petition to be raised. With respect to the first question it is admitted that if the will had contained the express power which is found in various collections of precedents, of resorting to income of previous years, the power would have been good. There is no such express

(a) 14 *Ves.* 202.

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press power. Is then that power to be implied? In my opinion it is. On reading this will, it could not, as it seems to me, have been intended that the trustees should be compelled to make a settlement once a year, and that all balances should be irrevocably carried to the capital account. The words "yearly and every year" merely mean periodically, and do not render it necessary to keep a separate account, but leave it open to add, *de bene esse*, to the principal sum for the purpose of accumulation the sum not wanted in that year, but which might possibly be wanted for maintenance in another year. That being so, I should say, reading this will and the trusts created by it, that the trustees have the power to do that which is now in question. There is nothing more asked now than what a reasonable annual sum, if that had been allowed, would have amounted to, but which has not been allowed from year to year. I think that it may be now allowed, without any injustice to the reversioners. If the trustees had annually made the allowance, the reversioners would have been in exactly the same position as that in which they will find themselves when we allow it. Therefore it seems to me that Vice-Chancellor *Stuart* was fully justified in making the allowance which he made of 500*l.* and other sums.

The power then existing, is it proper for the Court in its discretion to exercise it? It might not be proper to exercise it for the benefit of the creditors, but it is proper to exercise it for the welfare of the object of the testator's bounty. Unless this sum is granted there is not the slightest chance of his being relieved from his distressing position, and made a creditable member of society. He has debts which he has no means of paying. If he should put in force the machinery of the insolvent act, he would lose all the benefit of the property under this will. That being so, it seems to me clearly for his benefit, and it may

may reasonably be believed, judging from the language he has employed, that the testator, if before us, would think this a proper exercise of the power.

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We must watch over the interests of the young man, and, for his own sake, take care that he is not entrusted with the management of this fund, it being given as a means of discharging his liabilities, and of giving him an opportunity of starting again in life.

The LORD JUSTICE KNIGHT BRUCE.

The amount which the Court is asked to apply falls considerably short of the fund composed of accumulated income. According to a fair interpretation of the will, I think that the power exists of doing that which is asked; but, as the Lord Chancellor has said, the greatest care and attention is requisite with respect to the mode of application of the money, and the person or persons to whom that application is entrusted. For that purpose, I should suggest that a scheme for the approval of the Court should be prepared by counsel, which either the Lord Chancellor will consider, or, if the Lord Chancellor prefer it, the Lords Justices.

The LORD JUSTICE TURNER.

During the argument at the bar, I had a very strong impression that it had been decided that income which had been accumulated could not be resorted to for future maintenance, and I find that it was so held by Lord *Manners* in *Ex parte M'Key* (*a*); but the case of *Car-michael v. Wilson* (*b*), which was referred to in the argument

(*a*) 1 *Ball & B.* 405.

(*b*) 3 *Moll.* 84.

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ment of this case, certainly seems to me to be a strong authority against the decision in *Ex parte M'Key*.

It is to be observed, however, that in neither of the above cases does it appear what were the particular trusts of the will under which the question arose, and I apprehend that all these cases depend upon the particular trusts. The Court acts upon, and carries out, the intention of the testator, and does not go beyond it, except in cases where the parties have the same common interest, or those who have an adverse interest are consenting.

Looking to the trusts of this particular will, I cannot see my way to do what is asked by this petition. There is not, and cannot be, any consent on the part of those whose interests are opposed to the application, and, in my opinion, the intention of this testator was, that his trustees should, de anno in annum, apply so much of the interest of the 5,000*l.* as they should think necessary for the purposes which he has mentioned, and that so much of each year's income as should not be so applied should form part of the accumulated fund, and be subject only to the trusts declared of that fund. The trustees are to apply so much as they shall think necessary, yearly and every year, and subject thereto, meaning, as I understand, subject to the application of what they may think necessary in every year, to invest and accumulate upon the specified trusts. I think, however, that the Court ought to do for the Petitioner what, according to its judgment, the trustees in the exercise of a reasonable discretion ought to have done, as in the case of *Maberly v. Turton* (a), and under the circumstances of this case I think the trustees ought to have allowed the Petitioner the whole income of the fund from *February, 1857*, when

he

(a) 14 *Ves.* 499.

he came of age and determined not to follow the profession of the law, to which he had been bound during his minority. He had then only the income of the 3,000*l.* or 4,000*l.* to which he was entitled under his father's will, and which cannot, I think, be said to have been sufficient to prepare him for another profession. In my opinion, therefore, the utmost that we can do in this case is, to give the Petitioner so much of the accumulated fund as has arisen since he attained twenty-one, after deducting the 500*l.* which he has already received, in addition, of course, to the future interest to which he is already entitled under the Vice-Chancellor's order.

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STURGIS v. MORSE.

June 26, 28.
July 18.

Before The
LORDS JUS-
TICES.

THIS was an appeal from the decision of the Master of the Rolls holding that the Plaintiff, as assignee under the insolvency of *Thomas George Coningham*, was not entitled to freehold and copyhold hereditaments, of which the insolvent had been tenant in tail, in priority to the assignees under his subsequent bankruptcy. The

case although a conveyance by a tenant in tail, without a disentailing assurance, will in general pass the fee, only determinable

by the entry of the issue inheritable under the entail, yet the conveyance under the 1 Geo. 4, c. 119, by a tenant in tail who was an insolvent debtor, was held to be, without any such entry, defeated by a statutory conveyance under a subsequent bankruptcy, such statutory conveyance not operating like a recovery by way of confirmation of the previous conveyance.

An insolvent debtor in 1825 took the benefit of the then Insolvent Debtors' Act (1 Geo. 4, c. 119) and executed the usual conveyance and assignment of all his estate and effects to the provisional assignee in insolvency, but did not include in his schedule or disclose to the provisional assignee an interest to which he was entitled as tenant in tail in remainder, expectant on the death of his father, in certain real estate. The father died in 1826, and in 1829, the insolvent conveyed his estate tail by way of mortgage, and afterwards became bankrupt, when his estate tail was in 1834 barred by the Commissioner by a deed, in which the mortgagees joined:—Held, that the interest of the provisional assignee in insolvency in the estate ceased on the death of the insolvent in 1844, and that the estate belonged to the mortgagees and assignees in bankruptcy.

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case is reported below in the 28th Volume of Mr. Beavan's Reports (*a*), and the facts appear sufficiently from that report, and the judgments of the Lords Justices.

Mr. *R. Palmer* and Mr. *Osborne* supported the appeal.

Mr. *Selwyn*, Mr. *Stiffe* and Mr. *Hardy* appeared for the several Respondents.

The following statutes and authorities were referred to:—54 *Geo. 3, c. 28, s. 48*; 1 *Geo. 4, c. 119, ss. 4, 6*; *Took v. Glascock* (*b*); *Machil v. Clark* (*c*); *Massy v. Batwell* (*d*); *Beck v. Welsh* (*e*); *Pye v. Daubuz* (*f*); *Ex parte Fripp* (*g*); *Ex parte Somerville* (*h*); *Thorpe v. Goodall* (*i*); *Doe d. Jones v. Jones* (*k*); *Ex parte Wise* (*l*); *Nouaille v. Greenwood* (*m*); *Hart v. Middlehurst* (*n*).

Judgment reserved.

#### *The LORD JUSTICE KNIGHT BRUCE.*

July 18.

In the year 1825, *Thomas George Coningham* took, as an insolvent debtor, the benefit of the Insolvent Act then in force, namely, the statute 1 *Geo. 4, c. 119*, upon which occasion he executed, under that statute, an assignment of his property which, dated the 9th of *February*, 1825, was in these words:—

“ This indenture, made the 9th day of *February*, in the

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|------------------------------------------------------------------------------------------------|-----------------------------------------------------------|
| ( <i>a</i> ) <i>Page</i> 398.                                                                  | ( <i>h</i> ) 3 <i>D. &amp; C.</i> 668; 1 <i>Mont.</i>     |
| ( <i>b</i> ) 1 <i>Saund.</i> 260 and note.                                                     | & <i>Ayr.</i> 408.                                        |
| ( <i>c</i> ) 2 <i>Salk.</i> 619; <i>Ld. Raym.</i> 778; 7 <i>Mod.</i> 18; <i>Com. Rep.</i> 119. | ( <i>i</i> ) 17 <i>Ves.</i> 388; 1 <i>Rose</i> , 40, 270. |
| ( <i>d</i> ) 4 <i>Dr. &amp; War.</i> 58.                                                       | ( <i>k</i> ) 1 <i>B. &amp; C.</i> 238.                    |
| ( <i>e</i> ) 1 <i>Wils.</i> 276.                                                               | ( <i>l</i> ) <i>Mon. &amp; M'Ar.</i> 65.                  |
| ( <i>f</i> ) 3 <i>Bro. C. C.</i> 595.                                                          | ( <i>m</i> ) <i>Turn. &amp; R.</i> 26.                    |
| ( <i>g</i> ) <i>De Ges.</i> 293.                                                               | ( <i>n</i> ) 3 <i>Ath.</i> 371.                           |

the year of our Lord 1825, between *Thomas George Coningham*, late of *Pump Yard, Ratcliffe*, in the county of *Middlesex*, baker, an insolvent debtor, now a prisoner in the debtors' prison for *London and Middlesex*, of the one part, and *Henry Dance*, of *Lincoln's Inn Fields*, in the county of *Middlesex*, gentleman, provisional assignee of the estate and effects of insolvent debtors in *England*, pursuant to an act of parliament passed in the first year of the reign of king *George IV*. in that behalf, of the other part: Whereas the said *Thomas George Coningham* hath this day subscribed his petition to the Court for the Relief of Insolvent Debtors, praying for his discharge by virtue of the said act. Now this indenture witnessed that, in obedience to the said act, he, the said *Thomas George Coningham*, hath conveyed, assigned, transferred and set over, and by these presents doth convey, assign, transfer and set over unto the said *Henry Dance*, as such provisional assignee as aforesaid, his successors and assigns, all the estate, right, title, interest and trust of the said *Thomas George Coningham*, in and to all the real and personal estate and effects of the said *Thomas George Coningham* in possession, reversion, remainder or expectancy, except the wearing apparel and other such necessaries of the said *Thomas George Coningham* and family, not exceeding in the whole the value of *20l.*, together with all deeds, evidences and writings touching and concerning the said estate and effects and every part thereof, To have and to hold, receive and take all and every the said estate and effects of the said *Thomas George Coningham*, real and personal, in possession, reversion, remainder or expectancy, of every nature and kind whatsoever (except as aforesaid), conveyed, assigned, transferred and set over, or mentioned, or intended, or directed by the said act to be hereby conveyed, assigned, transferred or set over, with their and every of their rights, members and appur-

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tenances, unto the said *Henry Dance*, his successors and assigns, according to the respective natures, properties, and tenures thereof; in trust, nevertheless, and to and for the use, benefit and advantage of such several persons as shall be named or specified as creditors, or as claiming to be creditors of the said *Thomas George Coningham* in his schedule to be filed in the said Court, and to and for such other uses, intents and purposes, and in such manner and form as are in and by the said act expressed of and concerning the same, as by the said act, reference being thereunto had, will more fully appear: Provided always, and these presents are upon this express condition, nevertheless, that in case the said *Thomas George Coningham* shall not obtain a discharge by virtue of the said act, then that these presents and the conveyance and assignment hereinbefore made as aforesaid shall, from and after the dismissal of the said petition of the said *Thomas George Coningham*, praying for such discharge, be null and void to all intents and purposes whatsoever, anything herein contained to the contrary thereof in anywise notwithstanding." And the signatures and seals of Mr. *Coningham* and Mr. *Dance* are affixed to it and attested.

The insolvent was, in the year 1825, discharged in due course, and the assignment or conveyance has never been avoided or invalidated. Before *February*, 1825, he had, under the will of his paternal grandfather, become entitled equitably, or legally and equitably, as tenant in tail in remainder expectant on the determination of certain prior particular estates, which have determined, to an undivided twelfth part of certain freehold property devised by that will. The insolvent had also interests in remainder in the other eleven twelfths of that property, interests to which it is unnecessary for my present purpose particularly to advert, nor need we refer to the testator's

tator's copyholds. The insolvent's father was, under the same will, tenant for life in possession of the whole property, but died in the year 1826, when the insolvent became, or subject to what had previously taken place, became tenant in tail in possession. He died in the year 1844, and left issue now subsisting, issue, namely, capable of inheriting under the entail if not barred.

The present litigation, which was commenced after the year 1844, has become reduced to the question of the right to the income and enjoyment of the twelfth part first mentioned from the death of the insolvent, there being now no dispute remaining as to anything else. The Plaintiff, the present assignee under the insolvency, claims this income, this enjoyment, by force of the statute 1 Geo. 4, c. 119, and the deed of the 9th of February, 1825. His claim is resisted by those who would have been entitled if the insolvency had not taken place. They say that they are not precluded or affected by the statute or the deed, and of this opinion has been the Master of the Rolls, an opinion as to which we have to express our assent or dissent. Having attentively considered the authorities to which we have been referred, and the arguments with which we have been assisted by the bar, I agree with his Honor.

It is true that the insolvent, some years after the insolvency, was in the year 1831 made a bankrupt, and the estate tail in the twelfth now in dispute, to which, as already stated, he had become entitled under his grandfather's will was, it is probable or certain, effectually and completely barred some time between that event and the year 1835. But neither the bankruptcy nor the barring of the estate tail makes, I think, any difference material for any present purpose. The statute 1 Geo. 4, c. 119, did not, I conceive, as to the twelfth in controversy,

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confer on the original or any assignee under the insolvency, any right, as against the issue in tail of the insolvent, or as against any remainderman in tail expectant on the death of the insolvent and failure of his issue; nor does it appear to me that the deed of *February, 1825*, as to this twelfth, contains or amounts to a conveyance or grant of an estate of inheritance legally or equitably, in form or substance, or a covenant or contract to make or obtain a conveyance or grant of an estate of inheritance; nor, I think, is the insolvent shown to have made any representation that his estate or interest in the twelfth was greater or other than in truth it was, and I conceive that the statute and the deed affected only such extent of interest in the twelfth as, in the year 1825, the insolvent was, at law or in equity, able rightfully and effectually to convey without fine, and without recovery, or would have been so if there had been no insolvency. The state of the insolvent law anterior to the statute 1 *Geo. 4*, or subsequent to the year 1826 is, I apprehend, not of importance in the present controversy. Though, therefore, it may be that, if the insolvency had taken place, and the deed been executed under the insolvent law, as it stood in the last year of the reign of *Geo. 3*, or as it now stands, the Plaintiff would have been well founded in his contention, he is, I think, not so, the facts being as they are.

Whether, if the insolvency of 1825 had not taken place, and the present Plaintiff had claimed under a purchaser from the insolvent, to whom for valuable consideration the insolvent had, in that year, representing himself as seised in fee simple in possession, or in remainder, professed and purported to convey by deed, the fee simple in possession or remainder, or had, in that year, contracted to convey the fee simple in possession or remainder, the Plaintiff would have been entitled to a decision;

cision; I wish to be considered as not intimating an opinion. Here intention and contract, and representation, are, as I conceive, all wanting to the Plaintiff.

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It has been said for the Plaintiff that he is entitled, if not on any other ground, yet on the ground that the insolvent did not disclose to any assignee under the insolvency the interest in question. That concealment, however, and the circumstance that the insolvent's title, or former title, in this respect remained, if it did remain, as long not known to any assignee under the insolvency as alleged do not, I think, help the Plaintiff on the present occasion. Misrepresentation, I repeat, there seems to have been none.

I agree also with the Master of the Rolls, that his Honor was not, by his decree of *November*, 1857 (*a*), affirmed by the Lords Justices in 1858 (*b*), precluded from making the order now under appeal.

## **The Lord Justice Turner.**

This is an appeal by the provisional assignee of the Court for the Relief of Insolvent Debtors against parts of an order of the Master of the Rolls, made upon the hearing of the cause for further consideration. The parts of the order which are appealed from are those in which are contained the declaration that the estate and interest of the Plaintiff, as assignee under the insolvency, in the one twelfth part of certain real estates in the pleadings mentioned ceased on the death of the insolvent in *October*, 1844, and that such disentailing deed or assurance as is mentioned in the decree did not operate to enlarge the estate

(a) *Sturgis v. Morse*, 24 Beav. 541. (b) *Sturgis v. Morse*, 3 De G. & J. 1.

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estate and interest of the assignee under the insolvency of *Thomas George Coningham* in the hereditaments and premises comprised in the first schedule; but that it enured for the benefit of the Defendants *South Morse* and *William Pennell*, as assignees under the bankruptcy, and of the Defendants *Judkins* and *Smith*, as assignees of the Defendant *Josias Pidgeon* and of the mortgage of the 28th of *October*, 1829, executed by the insolvent to *Josias Pidgeon* subsequent to the final discharge of the insolvent as in the pleadings mentioned, according to their respective rights and interests therein, and such of the other declarations contained in the order as are consequent on the last-mentioned declaration, and so much and such parts of the inquiries and directions contained in the decree as proceed on the footing of the said several declarations.

*Thomas George Coningham*, in the year 1825, took the benefit of the Act then in force for the Relief of Insolvent Debtors in *England*, 1 *GEO. 4*, c. 119. He was then tenant in tail in remainder expectant on the decease of his father of an undivided twelfth part of certain freehold and copyhold estates, which is now represented by the property in question on this appeal; and upon applying for the benefit of the act, he executed, in conformity with its provisions, the usual conveyance and assignment to the then provisional assignee, which has been read by my learned Brother. He obtained his final discharge under the act on the 13th of *April*, 1825. On the 1st *January*, 1826, his father died. On the 28th of *October*, 1829, he entered into an agreement with *Josias Pidgeon* to mortgage the estate to him. On the 31st of *December*, 1831, he became bankrupt. The Defendant *South Morse* is the creditors' assignee under the bankruptcy.

This

This Defendant purchased, on his own account, other undivided shares of the entire estate, and ultimately, by a deed dated the 1st *August*, 1834, certain portions of the estate were allotted and conveyed to him in severalty in respect of the shares which he had purchased, and other portions of the estate were also allotted and conveyed to him and to the official assignee under the bankruptcy in severalty in respect of the one twelfth of which the bankrupt had been tenant in tail and of other shares in which the bankrupt had acquired a base fee. These latter portions were so conveyed to this Defendant and the official assignee subject, amongst other things, to *Pidgeon's* mortgage, in trust to sell for the benefit of the creditors under the bankruptcy. The commissioner acting in the execution of the fiat, the assignees under the fiat and the bankrupt concurred in and executed this deed, and the deed purported to bar the estate tail of the bankrupt in the premises of which he was or theretofore had been tenant in tail.

Under this deed the Defendant *South Morse*, the assignee under the bankruptcy, entered into possession of the property allotted and conveyed to him and the official assignee, and he has ever since continued in possession thereof.

The bankrupt died on the 14th of *October*, 1844. He left issue and his issue has not yet failed.

The contention on the part of the Appellant is, that an estate in fee, determinable by the entry of the issue of *Thomas George Coningham*, passed to the provisional assignee by the conveyance to him, and that this determinable fee was enlarged to an absolute fee by the operation of the disentailing assurance under the bankruptcy. That a conveyance by a tenant in tail, without a disentailing

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tailing assurance, will in general pass a fee determinable by the entry of the issue seems to me to be settled by authority; and, certainly, I am not satisfied that the conveyance to the provisional assignee did not in this case pass such a fee; but, assuming that it did, and assuming also that the determinable fee was not defeated by the continuance of the possession of the assignee under the bankruptcy after the death of the tenant in tail, a point on which I give no opinion, it seems to me to be clear that it must have been defeated by the disentailing assurance under the bankruptcy, unless that assurance operated to enlarge it; for otherwise the power of effectually barring an estate tail under a bankruptcy would, in all cases where the bankrupt had made an alienation without a disentailing assurance, depend upon whether the issue in tail thought fit to enter or not.

I think, therefore, that the Appellant's case cannot be maintained on the mere ground of the non-entry of the issue, and that, in order to maintain his case, the Appellant must show that the determinable fee was enlarged by the disentailing assurance. That disentailing assurances will, as recoveries formerly did, enlarge and confirm defective estates and titles previously granted, cannot, I think, be disputed; but this rule rests upon technical grounds applicable to recoveries, and it does not, as I conceive, apply to estates created under statutory powers, like the power in the Bankrupt Acts, to bar estates tail. Estates created under such powers, must, as I think, take effect according to the intention of the legislature in creating the powers. It was upon that principle the case of *Beck v. Welsh* (a) seems to me to have proceeded. Of course, however, the principle cannot prevail if there be a paramount equity overriding the power

(a) 1 *Wils.* 276.

power to bar the estate tail, and accordingly we find that, in many cases, the bar of an estate tail under a bankruptcy has been held to enure for the benefit of mortgagees whose title was defective in consequence of no recovery having been suffered. Whether it was rightly held in *Beck v. Welsh* (a) that there was no such overriding equity in the mortgagee in that particular case, and whether in some of the subsequent cases (I refer particularly to some of the cases in bankruptcy), it has been rightly held that there was such an overriding equity, are questions with which, as I think, we have in this case nothing to do. Whether the decisions in the particular cases were right or wrong, the principle remains the same, and the question, therefore, which we have to consider in this case, as I view it, is whether there was any equity in the provisional assignee under the Insolvent Debtors Act which could override the power of barring the estate tail under the Bankrupt Act.

In my opinion there was no such equity. The act of parliament, under which this insolvency took place, clearly does not in terms reach estates tail, and the existence in other acts of parliament, both in insolvency and bankruptcy, of express provisions for reaching such estates is, I think, quite sufficient to show that in the absence of such provisions they cannot be reached. The very nature of the estates would indeed seem to be sufficient to exempt them from the operation of such laws unless expressly subjected to them.

I am of opinion, therefore, that this order is right, and that the appeal must be dismissed, and with costs.

(a) 1 *Wils.* 276.

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TURNER v. WRIGHT.

July 4, 7, 21.

Before The
Lord
Chancellor
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CAMPBELL.

Devisee in fee
 subject to an
 executory de-
 vice over in
 the event of
 his not leaving
 issue living at
 his decease :—

Held, dis-
 punishable for
 legal but not
 for equitable
 waste.

THIS was an appeal by the Defendant from a decree of Vice-Chancellor *Wood*, declaring in substance that the Defendant, a tenant in fee simple of certain real estates, subject to an executory devise over on the happening of a contingent event in favor of the Plaintiff, was punishable for legal waste, but not for equitable waste. The facts of the case, which is reported below in Mr. *Johnson's* reports (*a*), were the following :—

E. Wright by his will, dated in *September*, 1853, charged his mansion-house and estates in *Brattleby* and *North Kelsey*, in the county of *Lincoln*, with payment to his sister *Mary Wright* and her assigns during her life of the clear yearly rent-charge of 300*l.*, free of legacy duty, with powers of distress and entry for recovering the same. The testator then gave and devised as follows :—" And (subject to the said yearly rent-charge of 300*l.*, and the powers and remedies for recovering the same) I devise all my said mansion-house and estates in *Brattleby* and *North Kelsey* aforesaid, with the appurtenances, to the use of my brother the Reverend *William Wright*, rector of *Healing*, in the said county of *Lincoln*, in fee; but in case he should die without leaving issue living at the time of his decease, then I devise my said mansion-house and estates, with the appurtenances, to the use of my said sister and her assigns during her life, without impeachment of waste; and, from and after her decease, to the use of *Samuel Wright Turner*, of *Nettleton Rectory*, in the said county of *Lincoln*, Esquire,

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(a) *Page 740.*

in fee; but if he shall die without leaving issue male living at the time of his decease, then I devise my said mansion-house and estates to the use of the eldest son of the Reverend Dr. *Parkinson*, of *Ravendale*, in the said county of *Lincoln*, clerk, in fee; but in case such eldest son should die before he shall become entitled to the possession or to the receipt of the rents and profits of my said estates hereinbefore devised, then I devise my said mansion-house and estates to the use of *Robert*, the second son of the said Dr. *Parkinson*, in fee."

The will then contained a declaration that *Samuel Wright Turner* should, within one year next after he should become entitled to the possession or to the receipt of the rents and profits of the devised estates, take, use and bear the name and arms of the testator, or forfeit his interest under the will in the said estates.

The testator died in 1857, when *William Wright*, then of advanced age, entered into possession of the devised premises, and some time afterwards cut some, and marked for cutting other, timber upon those estates, and advertised a sale thereof. Thereupon *Samuel Thomas Turner* filed the bill in the present suit, alleging that a considerable portion of the timber so cut and marked for cutting had been planted and left standing as ornamental to the mansion-house and for shelter, and that other portions of it were immature, and praying that *W. Wright*, the Defendant, might be restrained by injunction from cutting down any timber, or at any rate, any ornamental or immature timber, and for an account of timber already cut.

At the date of the bill *W. Wright* had not had any issue, and the testator's sister had died.

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The Vice-Chancellor, by the decree appealed against, declared that the Defendant *W. Wright* was entitled to fell all such timber on the estates as was mature or fit to be cut, except such as was left planted or left standing by way of ornament or shelter with reference to the occupation of the mansion-house at *Brattleby*; but that he was not entitled to cut any unripe timber, or any timber planted or left standing for shelter and ornament as aforesaid, and directed an inquiry as to any timber for shelter or ornament as aforesaid, cut or marked for cutting; and that the Defendant should be restrained, pending the inquiry, from cutting the timber marked, on the Plaintiff's undertaking to answer damages.

Mr. *Rolt*, Sir *Hugh Cairns* and Mr. *Kay* for the Plaintiff.

It is agreed on both sides that the evidence is sufficient to show an intention to cut down ornamental timber. That raises the question both of legal and equitable waste; and as the case is re-opened, though the appeal is not that of the Plaintiff, we ask for an injunction to the full extent of the prayer of the bill. The question is, whether the Defendant is to be considered as absolute owner of the devised premises in fee, having a right to pull down the mansion-house and cut down timber as he pleases; in fact, not only whether he is unimpeachable for waste, but whether he is at liberty to do as he likes as to waste. The authorities, we submit, establish that the Defendant is impeachable for waste ordinary as well as equitable. The only error in the Vice-Chancellor's decree is, that it stops short of restraining all waste. As to equitable waste, the case of *Wright v. Athyns*(a) is in accordance with the decree; but *Robinson v. Litton*(b),

approved

(a) 17 Ves. 255; *Sugden, Law of Property*, 376.
 (b) 3 Atk. 209.

approved of by Lord *Eldon* in *Stansfield v. Habergham* (*a*), is an express authority in favor of our claim in its entirety. The case under consideration is different from that of tenant for life unimpeachable of waste. There equitable waste is restrained, but not other waste, for reasons grounded on the incidents of a life estate and the rules of this Court as to such incidents. But here the question is merely of the intention of the testator; *Micklethwait v. Micklethwait* (*b*); and upon the construction of this will it is submitted that an intention is to be implied that the estate in its integrity was to go to its successive takers, and that no timber whatever was to be cut by the Defendant pending the contingency on the happening of which the estate is to go over. The estate given to the Defendant, though not a fee simple, may be dealt with by the Defendant as if it were a fee, subject always to the contingency of its being defeated on the happening of a contingent event. If that event comes to pass, then the property in its integrity is to pass to others in succession, but that could not take place if the Defendant's interest were unimpeachable of waste. Had the property given consisted of a single house, or a set of chambers in an upper floor, it could not have been contended that the Defendant by removing, or concurring in the removal of, the house, might leave to his successor, on the contingent event happening, a mere tabula rasa of soil, or an upper layer of air. A tenant in tail general or special is not to be restrained from committing waste, inasmuch as by executing a disentailing deed he may make the estate his own, but when upon the failure of issue inheritable under the entail his estate becomes an estate tail after possibility of issue extinct, he becomes impeachable of waste, this Court interposing in favor of the intention.

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(*a*) 10 *Ves.* 273.

(*b*) 1 *De G. & J.* 504.

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The same reasons apply as a ground for the restriction of legal waste as of equitable waste, and we submit that the injunction should extend to the restraint of all waste.

Mr. Daniel and Mr. Speed, for the Defendant.

The authorities upon the doctrine of waste are divisible into two classes; first, as it affects the owner of an estate of inheritance; secondly, as it affects the owner of an estate which could not by possibility extend beyond his life. It is to those two classes of cases alone that the doctrine of equitable waste is ever applied, and the Court is not disposed to extend the doctrine, but considers it as already extended too far. The only instance in which the doctrine is applied as against the owner of the inheritance, is where the estate of inheritance is held upon a trust. Where the Court is satisfied of the existence of a trust, it will restrain the trustee from committing waste of any kind for his own benefit; but where there is no trust the Court leaves the owner of the inheritance in undisturbed enjoyment of all his rights as tenant in fee simple, without any restraint as to waste of any description. The authorities which have been cited are all cases of trust, and therefore in our favor rather than against us. The decision appealed from is the first instance of an injunction being granted under similar circumstances. The right to restrain the owner of the inheritance from cutting down timber is not maintainable, and for this reason, that an estate of inheritance includes as one of its incidents the right to do the acts which in the owner of a limited interest only would be equitable waste; *Savil's Case* (a). An estate in fee simple, though followed by an executory devise over on a contingency, is, to all intents and purposes, a fee simple, and attended

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(a) *Moseley*, 224.

with the same incidents, as a right to curtesy or dower; *Hargrave's Collectanea Juridica* (a). There is no reason why the incident of a right to commit waste should be excepted. The intention of the testator is to guide the Court in the exercise of its jurisdiction, and in this will the testator seems to have been well advised as to the distinction between legal interests to which the control of a Court of Equity is an incident, and legal interests to which it is not incident. It is true that the lands are to be held and enjoyed by the devisees in succession, but that is no reason for qualifying or altering the rights incident to the successive estates. In all cases where the doctrine of equitable waste has been applied as against an owner in his own right, his estate has been an estate for life either by force of the limitation or by the happening of a particular event. Thus in the case of a tenant in tail after possibility of issue extinct, it is applied because by the failure of inheritable issue the estate tail has in effect been converted into a life interest; *Williams v. Williams* (b); *Vane v. Lord Barnard* (c); *Burges v. Lamb* (d). The evidence shows that the timber has been cut and marked under the advice of a surveyor, as timber which may be felled in due course of husbandry. There is no destructive or malicious cutting, and where that is so, it has not been the habit of the Court to grant an injunction, even as against a tenant for life; *Aston v. Aston* (e); *Piers v. Piers* (f); *Halliwell v. Phillips* (g); and still less as against the owner of a larger interest; *Hole v. Thomas* (h); *Twort v. Twort*;

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(a) *Vol. 1, p. 332.*

(d) *16 Ves. 174.*

(b) *15 Ves. 419.*

(e) *1 Ves. 264.*

(c) *2 Vern. 738; Prec. in Ch.*

(f) *1 Ves. 521.*

*454; Gilbert's Eq. Rep. 127; 1*

(g) *4 Jur. (N. S.) 607.*

*Salk. 161; 1 Eq. Ca. Ab. 399.*

(h) *7 Ves. 589.*

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v. Twort (a); Attorney-General v. The Duke of Marlborough (b).

Mr. Rolt in reply.

There is no distinction as to restraining waste between equitable waste and malicious waste. The motive does not form an element of the question. It is said that the doctrine is not to be extended, but that means not extended to a different class of cases from those in which it is already applied, viz. wherever the party sought to be restrained is not the owner of an absolute indefeasible estate in fee, or of an estate of inheritance capable of being at once converted into a fee simple.

Judgment reserved.

The LORD CHANCELLOR.

July 21.

In this case the Plaintiff, by his bill, prayed an injunction "to restrain the cutting of any timber, or at any rate of any ornamental timber," growing upon the lands devised in fee to the Defendant, subject to an executory devise over to the Plaintiff.

The decree of the Vice-Chancellor declared, "that the Defendant is entitled to fell all such timber on the devised estates as is mature and fit to be cut, except such as has been planted or left standing by way of ornament or shelter with reference to the occupation of the mansion-house on the said devised estates; but that he is not entitled to fell any unripe timber or any timber planted or left standing for ornament or shelter as aforesaid."

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(a) 16 Ves. 128.

(b) 3 Mad. 498.

The result of the decision is, that the Defendant is disipunishable of legal, but not of equitable, waste. After great consideration, I agree with the Vice-Chancellor on both questions.

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As to the first, my opinion is clear and decided. The Defendant is tenant in fee simple, with all the incidents of such an estate, although there be executory devises over in case he should die without leaving issue living at the time of his decease. Not making any unconscien-tious use of the powers belonging to him as tenant in fee simple, why should he not reasonably exercise these powers? Is there anything unconscientious or unreasonable in his cutting down timber mature and fit to be cut, and not such as has been planted or left stand-ing by way of ornament or shelter? If we are to regard the intention of the testator in such limitations, can the intention be supposed to be, that the first taker, who is made tenant in fee, should during the whole of his life, although he should have numerous children and grand-children, not be entitled to cut down a tree upon the property, unless for his botes? In this case, the pre-sumed intention of the testator is strengthened by the first executory devise over, which is for life and sans waste. He could not have intended that the first taker, to whom he gave a fee, should be more restricted in the management of the property than the devisee over, to whom he gave only a life estate. Having given the first taker a fee, he probably thought it quite unnecessary expressly to make him disipunishable of waste.

So that equitable waste is not committed, the boun-tiful intention of the testator in favor of the devisees over will be completely fulfilled; for, on the happening of the contingencies limited, the property will come to them in the same condition in which it would have been

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if the testator, being a prudent man, had himself survived and had managed and enjoyed it till the time when the events happen upon which they are entitled to enter.

The onus seems to lie upon the Plaintiff to show, by authority, that tenant in fee simple, subject to an executory devise over, is not entitled to cut timber. It is admitted that no express decision to this effect is to be found in the books, and that no instance has ever yet occurred of an adult devisee in fee with an executory devise over being restrained.

The Plaintiff's counsel relied on dicta to be found in the reports of three cases, *Robinson v. Litton* (*a*) ; *Stansfield v. Habergham* (*b*), and *Wright v. Atkyns* (*c*). According to *Vesey*, jun., a very careful and accurate reporter, Lord *Eldon* did say, in *Stansfield v. Habergham* (*b*), "I should by dissolving this injunction contradict what has been understood to be the doctrine of this Court; that, where there is an executory devise over, even of a legal estate, this Court will not permit the timber to be cut down." But this doctrine is not to be found in any text writer, and it has never been acted upon. In *Wright v. Atkyns* (*c*), the power of the widow to cut down timber was only questioned upon the supposition that she took no more in equity than an estate for life. In *Robinson v. Litton* (*a*), Lord *Hardwicke* was influenced by the consideration that the tenant in fee simple with an executory devise over was the infant heir of the testator, and was about to cut down timber improvidently. The limitation was as stated by *Cruise* (*e*); and the infant, though seised of

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(*a*) 3 *Atk.* 209; *Cru. Dig. tit.* 1 *Ves. & Bea.* 313; *Turn. & Rvi. ch. 7, sec. 26.* *Russ.* 143.

(*b*) 10 *Ves.* 273.

(*d*) 6 *Cruise*, 428, 429.

(*c*) 17 *Ves.* 255; 19 *Ves.* 299;

the legal estate in fee, was entitled to the rents and profits only until he attained twenty-one, i. e. for a chattel interest. After that he was to become trustee for his sisters; and, even according to the report in *Atkyns*, the circumstance of the infant being a trustee for the benefit of his sisters was mainly relied upon in granting the injunction (*a*).

Therefore, as to legal waste, I think there is no authority to outweigh the considerations which, upon principle, lead strongly to the conclusion that, so far, the injunction ought to be dissolved.

Had there been a charge in the bill, supported by evidence, that the cutting down of the ornamental and immature timber was malicious, I should have entertained no doubt that this Court ought to interfere by injunction. Tenant in fee simple, subject to an executory devise over, of a mansion surrounded by timber for shelter and ornament, cannot say that the property is his own, so that out of spite to the devisee over, he may blow up the mansion with gunpowder and make a bonfire of all the timber. The famous *Raby Castle Case* (*b*) shows that such things may not be done by tenant for life sans waste, and tenant in fee with an executory devise over, actuated by malice, would not have greater liberty to destroy.

The waste which intervenes between what is denominated legal waste and what is denominated malicious waste, viz., equitable waste, may admit of a different consideration. But equitable waste is that which a prudent man would not do in the management of his own property. This Court may interfere where a man unconsciously exercises a legal right to the prejudice
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(*a*) 3 *Atk.* 209. (*b*) *Vane v. Lord Barnard*, 2 *Vern.* 738.

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of another—and an act may in some sense be regarded as unconscientious if it be contrary to the dictates of prudence and reason, although the actor, from his peculiar frame of mind, does the act without any malicious motive. The prevention of acts amounting to equitable waste may well be considered as in furtherance of the intention of the testator, who, no doubt, wished that the property should come to the devisee over in the condition in which he, the testator, left it at his death; the first taker having had the reasonable enjoyment of it, and having managed it as a man of ordinary prudence would manage such property were it absolutely his own. In the present case the devise being by the testator of "all his said mansion-house and estate at *Brattleby* and *North Kelsey*, with the appurtenances," there would be great difficulty in distinguishing for this purpose between the mansion-house and the ornamental timber. Indeed Mr. *Daniel* contended that, in the absence of malice, this Court could not interfere to protect the mansion-house. I put to him hypothetically, in the course of his able argument, the supposition that a mediæval castle is devised to *A.* in fee, subject to an executory devise over to *B.* in fee, and that *A.*, from a sincere dislike of turrets and moats, and a genuine love of roses and lilies and gravel walks, and believing that *B.* and all other sensible men must have the same taste, declares that he means to throw down all the buildings and to convert the site of the castle into a flower garden, and begins with setting men to strip the lead from the roof of the donjon tower. A bill being filed by *B.* for an injunction, would this Court interfere? Mr. *Daniel* answered: "*A.*, acting bona fide—No." Nevertheless I cannot help thinking that in spite of *A.*'s bona fides, what *A.* contemplated would be in the nature of a destruction of the subject devised and would certainly be in contravention of the intention of the devisor, so that *B.* would be entitled to an injunction.

injunction. It may be said that this is an extreme case, but it is by an extreme case that the soundness of a principle is to be tested. The presence or absence of a bad motive will not alone enable us to draw any satisfactory line between what is to be considered malicious and what is to be considered equitable waste, and no line to regulate the interposition of a Court of Equity by injunction can well be drawn other than the recognized and well established line between legal and equitable waste. The application of this to the facts of particular cases may sometimes be attended with difficulty; but the principle on which the line is to be traced is known and invariable.

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I am willing, with Vice-Chancellor *Page Wood*, to accept the clue by which Lord Justice *Turner*, in *Micklethwait v. Micklethwait* (*a*), proposed to solve the difficulty: "If a devisor or settlor occupies a mansion-house, with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house; and it cannot be presumed that he meant it to be denuded of that ornament which he has himself enjoyed." However, I cannot go so far as the Vice-Chancellor, who is reported to have added: "This reasoning obviously applies to every case of an estate limited so as to go in a course of succession." "The tenant for life, sans waste, is as much owner of the timber as the tenant in fee. Their legal rights in this respect are identical(*b*). Where an estate tail is created with successive estates tail in remainder, the estate entailed

(*a*) 1 *De G. & Jo.* 504, 524.

(*b*) *Turner v. Wright*, *John.* 740—751.

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entailed is "limited to go in a course of succession," but a tenant in tail is dispusniable of equitable as well as legal waste, because he may at any time bar the entail, and give himself a pure and absolute fee simple. Again, a tenant for life sans waste can hardly be said to be as much owner of the timber as the tenant in fee; for although the tenant for life (avoiding equitable waste), may fell and dispose of the timber in his lifetime, were he to sell growing trees they would go to the remainderman or reversioner, if not severed from the soil in his lifetime; whereas the tenant in fee might by sale or conveyance give the purchaser an absolute and permanent interest in the trees against all the world. Nevertheless I think that the rights and liabilities of tenant for life sans waste may be taken as a measure of the rights and liabilities of devisee in fee subject to an executory devise over.

The only analogy at all unfavorable to this view of the case is that of tenant in tail, with the reversion in the crown, and tenant in tail under an act of parliament which precludes the barring of the entail. Such tenants in tail are considered dispusniable of waste,—this being an incident of tenancy in tail,—probably arising from the power which generally subsists of barring the entail, and it not having been thought fit to make an exception in respect of those rare cases in which the power of barring the entail is withheld. But in the *Marlborough Case* (a), although the Court would not interfere on the mere ground that the tenant in tail was prohibited by statute from barring the entail—yet, having regard to the enactment "that *Blenheim House* should in all times descend and be enjoyed with the honors and dignities

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(a) 3 *Madd.* 498.

of the family," it was held that the Court ought to interfere not only to prevent the destruction of the house, but also to protect the timber essential to the shelter and ornament of the house (*a*).

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There is an analogy which entirely accords with the distinction made by the Vice-Chancellor in this decree between legal and equitable waste, viz. the case of "tenant in tail after possibility of issue extinct"—who is punishable of legal waste in respect of the estate of inheritance which was once in him, but may be restrained by injunction from committing equitable waste, this being an abuse of his legal power.

For these reasons I think that the decree of the Vice-Chancellor as he pronounced it should in all respects be affirmed, and that the appeal must be dismissed with costs.

(*a*) 3 *Madd.* 549.



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*July 4, 11.  
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tices.*

A property situate in a town, and comprising a warehouse with a small steam-engine, was described in particulars of sale under a decree as "well supplied with water." The property was well supplied with water, but only from the water-works of the borough, and by payment of water rates, there being no natural supply. The manufactories in the town were generally supplied with water from wells upon the properties themselves, though small steam-engines in warehouses frequently

were not :—*Held*, that there was a misdescription, and that a purchaser who purchased on the faith of the description in the particulars, without knowing the real state of the case, could not be compelled to complete his purchase without compensation.

The application of the purchaser for compensation was refused with costs in the Court below, but on appeal he was held entitled to be paid his costs, both of the proceedings in the Court below and in Chambers, and his costs of the appeal motion.

### LEYLAND v. ILLINGWORTH.

THIS was an appeal motion by a purchaser of property sold under the decree of the Court, seeking to be allowed compensation for an alleged misdescription in the particulars.

The property consisted of a freehold house at *Bradford*, in *Yorkshire*, with stable and outbuildings, and of adjacent business premises, consisting of a counting-house, offices and ware-rooms, with a steam-engine, engine-house, boiler-house, &c., the steam-engine being a small one of six-horse power. The particulars contained the following statement:—

"These premises are cellared throughout, *are well supplied with water*, and have recently been erected by Mr. *Jessop* regardless of expense."

The 11th condition provided that if any error or misstatement should appear in the particulars, it should not entitle the purchaser to be discharged from his purchase, but compensation was to be made, the amount to be settled by the Judge in Chambers.

The Appellant Mr. *Webster*, who was a house agent residing in the immediate neighbourhood of the property, became

became the purchaser at 1,720*l.* Very shortly after the sale he discovered that the only supply of water on the premises was from the *Bradford Waterworks*. A well had been sunk upon the property, but it appeared that it had no natural supply. From the evidence on the part of the purchaser it appeared that water rates to the amount of more than 20*l.* a year would have to be paid for the supply of water necessary to keep the steam-engine at regular work.

The purchaser, as soon as he had discovered the want of a natural supply of water, complained to the solicitors of the Plaintiff, who denied his title to any compensation. The purchaser therefore moved before Vice-Chancellor *Stuart* that he might be allowed to retain 300*l.* out of the purchase-money by way of compensation, or that an inquiry might be directed as to the amount of compensation to which he was entitled. The Vice-Chancellor refused the application with costs.

It was clearly established in evidence that many large manufacturing establishments in *Bradford*, some of which were on a higher level than the purchased property, were supplied with water from wells upon the properties themselves. The evidence indeed of the collector of rates went to show that all the steam-engines employed in the spinning and manufacture of worsted within the borough were supplied with water from natural sources upon the properties in which they were erected, though there were various small steam-engines in warehouses which were supplied from the water-works. He further deposed, that the expression "well supplied with water" was "a well known and familiar mode of describing premises in this district which have independent and ample supplies of water arising on the premises themselves, and which are not dependent on any

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any other supply; and such an expression would undoubtedly lead any one, not knowing positively the fact to be otherwise, to the conclusion that the premises were thus supplied without any aid from other sources."

Mr. *Bacon* and Mr. *Freeling* for the Appellant.

This is a clear case of misdescription, and to a very serious amount as regards the value of the property. It is not necessary to resort to the evidence as to what meaning is attached in *Bradford* to the expression "well supplied with water;" it is sufficient to advert to the clearly established fact that all, or nearly all, the manufactoryes in *Bradford* are supplied with water from sources on the premises, without recourse to the waterworks; and that being so, the purchaser would necessarily understand by the expression that the property was well supplied in that way. The Vice-Chancellor thought that it was the purchaser's business to inquire how the premises were supplied with water; and, moreover, that the purchaser, who lived close by, must be presumed to have known the real state of the case. *Dyer v. Hargrave*(a) answers both these points; and in *Price v. Macaulay*(b) it was held, that a vendor who makes a misrepresentation, and defends himself on the ground that the purchaser was not misled, is bound to show clearly that the purchaser did know the real state of things. *Martin v. Cotter*(c) proceeds on a similar principle, and shows that a vendor is not at liberty to make a misrepresentation and say that the purchaser might have found out the truth by inquiry. We could not move to be discharged from our purchase, as we should have been met by the 11th condition, but the purchaser would rather not take the property at all. He is, however, willing either to be discharged from his purchase or to complete it with compensation.

Mr.

(a) 10 *Ves.* 505.

(c) 3 *Jo. & Lat.* 496.

(b) 2 *De G., M. & G.* 339.

Mr. *Elmsley* and Mr. *Pemberton* for the Plaintiff;
Mr. *Malins* and Mr. *G. L. Russell* for Defendants.

We contend that it appears from the evidence that the purchaser knew the fact that the premises were supplied with water only from the waterworks. If so he clearly has no case, for he was not misled. But if the Court should be of opinion that he is not proved to have known the real state of things, we say that he must fail on another ground—that this was not a misrepresentation, but a vague representation of such a character as to put a purchaser on inquiry. There is no statement in the particulars that the property is supplied with water by a well. Suppose a house in *London* were advertised for sale in these terms, would any one understand them to mean that there was a well? In *Dyer v. Hargrave* it is admitted that if there is only a vague expression as to a patent matter, the purchaser cannot allege it as a misrepresentation. *Scott v. Hanson* (a); *Trower v. Newcome* (b); *Fenton v. Browne* (c), all lay down the same rule. In *Price v. Macaulay* there was a distinct definite misrepresentation. Here vague words about water supply were used as to property situate in a neighbourhood where two modes of supplying water were common, and the purchaser was put upon inquiry which mode was intended.

Mr. *Bacon* in reply.

Judgment reserved.

The LORD JUSTICE KNIGHT BRUCE.

It appears to me that the particulars of sale in this case must, by the paragraph containing the words "well supplied

July 9.

- (a) 1 *Sim.* 13; 1 *Russ. & My.* 128. (b) 3 *Mer.* 704.
(c) 14 *Ves.* 144.

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supplied with water," be taken to have substantially and in effect represented the property in question as supplied with water by a spring rising in it, or by a running stream passing through or into it, and so supplied as a matter of right belonging or incident to the property, without rent or payment of any kind for the water or its use; and that every stranger reading them was, if not bound to understand, at least justified in understanding them thus. But such a state of things does not, nor did at the time when the particulars were printed, or at the time of the sale, exist. The only supply of water to or in or upon the property is and then was obtained from the Corporation of *Bradford* by means of pipes, through which, for an annual pecuniary consideration amounting to not less than 20*l.*, and therefore substantial, that corporation causes water to be transmitted from a reservoir or stream, over which those interested in the property sold seem to have no power, but which seems to be in the ownership, or wholly or to a great extent under the control, of the corporation, a body that seems to supply other property in *Bradford* with water in the same way; very much in the manner, I suppose, in which the *New River Company* supplies water to many parts of the town in which we are.

The particulars of sale therefore, in the representation which they contained as to the supply of water, were materially inaccurate, were importantly otherwise than true, as the matter appears to me, though I do not impute fraudulent or dishonest intention to any one. The purchaser says that he is consequently entitled, either to be released from his bargain, or to have compensation for the misrepresentation and on account of the corporation payment; and in this claim I think him well founded and right, unless he has waived it, or had, when he became a bidder or contractor, knowledge or notice that the particulars

ticulars were in this respect untrue or inaccurate. Waiver being out of the case, it has been endeavoured to prove knowledge or notice against him. I think however that the attempt has failed, completely failed, and that he is entitled to assert that he was deceived by the particulars so far as the water supply is concerned. He offers to the vendors the option of relieving him from the contract or giving him compensation. If they do not elect, I think that he ought to be discharged from the contract. But in either case I conceive that he should have his costs incurred by affidavits and otherwise in the Chambers and Court of the Vice-Chancellor, as well as here, to the present time, though possibly he may if the case shall take the turn of compensation be awarded less than he has claimed—a point as to which I have no opinion—for his opponents have throughout endeavoured to hold him to his bargain, and have wholly resisted his demand for compensation, insisting that he was entitled to none. I consider them wrong throughout. The number of affidavits seems extraordinarily great on both sides in such a dispute, and I have doubted whether the attention of the Taxing-Master should not be called to this. There seems however reason to think it probable that the purchaser is scarcely or not at all to blame for it.

The Lord Justice Turner.

I am also of opinion that the purchaser in this case must be discharged from the purchase or be allowed compensation. The property purchased by him is described in the particulars as well supplied with water. If the question had been whether the supply of water was adequate or inadequate, the case would probably have fallen within the authorities referred to in opposition to the purchaser's claim. It would have been a question of opinion, not of fact, and the purchaser would have been put

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put upon inquiry. But there is no such question in this case. The description in the particulars is a representation of a fact, and the true question is, whether it was a fair representation of the fact. I am of opinion that it was not—that it was calculated to lead the purchaser to believe, as I am satisfied upon the evidence that he did believe, that there was a supply of water upon the property itself; not that the water was to be obtained only by the payment of a water rate. If all the property in *Bradford* had been supplied with water only by means of the corporation or other waterworks the case might have been, and, as I think, would have been, different; for the purchaser might then have been taken to have known that the expression "well supplied with water" meant well supplied with water upon payment of water rates: but the evidence abundantly shows that other properties, even at a higher level than the purchased property, have supplies of water upon the properties themselves, and the purchaser in this case may therefore well have supposed that this property had the like supply. The argument put forward upon this part of the case as to the difference between the supply of water to manufactories and to warehouses is much too refined to form the ground of imputing knowledge to the purchaser. Lord *Eldon's* observation in *Stewart v. Alliston* (a), "I should have great difficulty in decreeing a specific performance where the description is at the least of so ambiguous a nature that it cannot with certainty be known what it was that the purchaser imagined himself to be contracting for," seems to me to be decisive of this case.

(a) 1 *Mer.* 33.

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## WALKER v. WALKER.

THIS was an appeal from the decision of Vice-Chancellor *Wood* overruling a demurrer.

The Plaintiff *John Walker*, by his bill, claimed to be entitled absolutely to a legacy of 500*l.* under the will of his father *John Walker* the elder, dated in *April*, 1855, which contained the following disposition :—

“ First, I give and bequeath (subject to the proviso or condition next hereinafter contained) to my son *John Walker*, his heirs and assigns, the sum of 500*l.* absolutely: provided, nevertheless, and it is my mind and will, and I do hereby expressly declare and direct, that if my said son *John*, or his heirs or assigns, upon request, shall or do refuse or neglect to execute and deliver, within six calendar months after such request, a good, valid and effectual conveyance and assurance unto and to the use of my son *Edward Walker*, and his heirs and assigns, of the share, estate and interest of or belonging to him the said *John Walker* of and in the *Brook End* estate, with its appurtenances, and of which I now stand seised or possessed as tenant for life, and that free and clear and absolutely discharged of and from all incumbrances, charges, claims and demands whatsoever, then and in such case the said sum of 500*l.* or any part thereof shall not be paid or payable, and the said conditional gift and bequest shall in such event be and become from thenceforth wholly null and void to all intents and purposes whatsoever.”

The testator’s residuary real and personal estate was given upon trusts for sale.

*July 14; 18.**Before The  
Lord  
Chancellor  
Lord  
CAMPBELL.*

A testator bequeathed 500*l.* to *J.*, his eldest son, with a proviso that, if the legatee should neglect to convey, within six months after request, his interest in the *B.* estate to *E.*, another of the testator’s sons, the conditional gift was to become thenceforth wholly void. The testator, after the execution of his will, purchased all the legatee’s interest in the *B.* estate for 300*l.*:—

*Held,* that the legatee was entitled to the 500*l.*, discharged of the condition.

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At the date of the will the *Brook End* estate stood limited to the use of the testator for life, with remainder to the use of his children as tenants in common in fee.

The testator died in 1858, having in 1856 purchased of the Plaintiff his interest in the *Brook End* estate for 300*l.*

Mr. Willcock and Mr. T. H. Terrell in support of the appeal.

The question raised upon this demurrer is whether the Plaintiff, under the circumstances stated in the bill, is entitled to receive the 500*l.* given to him in the testator's will, or whether, by reason of the condition attached to the legacy having become impossible, the disposition has become void. The Vice-Chancellor was of opinion that, as the condition had become impossible of performance through the act of the testator himself, the legacy had become simple and unconditional. But the paramount object of the testator to be inferred from the language of the will was, not a gift of 500*l.* to his son *John*, but a gift of *John's* interest in the *Brook End* estate to the testator's son *Edward*. It is a proposal to *John* to sell his share in the *Brook End* estate for 500*l.* payable out of the testator's estate. The intention was not to give an unconditional legacy, but that *John* should be put to his election. Here there is no payment to be made of the legacy till the condition shall be performed. The condition is a condition precedent, and assuming for the sake of the argument that it has become impossible of performance, the legacy is gone (a). But the performance of the condition cannot be regarded as impossible, since the testator has directed

(a) *Co. Litt.* 206 b; *Swin-* *Com. Dig. tit. Condition, D. 2.*  
*burne on Wills*, vol. 1, p. 404;

directed his real estate to be sold, and it is still open to the Plaintiff to purchase the share in the *Brook End* estate to which he was formerly entitled in remainder. The gift of the legacy to *John* was coercendi causâ, non benevolentia; *Lowther v. Cavendish* (a).

*Mr. G. M. Giffard* and *Mr. W. W. Karslake* for the Plaintiff.

The testator, by purchasing the interest of his son *John* in the property to be conveyed, and thus by his own act rendering the performance of the condition impossible, must be considered as having intended to dispense with the condition altogether. Knowing that his son *Edward* could not obtain the conveyance from *John*, and that *John* had not the estate to convey, he nevertheless leaves in his will this bequest of 500*l.* to *John*; *Smith v. Conodery* (b); *Gath v. Burton* (c); *Coventry v. Higgins* (d); *Graydon v. Hicks* (e); *Peyton v. Bury* (f).

*Mr. Terrell* replied.

*The LORD CHANCELLOR.*

I am of opinion that the decision of the Vice-Chancellor overruling this demurrer must be affirmed, and that this appeal must be dismissed with costs.

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|---------------------------------------------------------------------------|-------------------------------------------------|
| (a) 1 <i>Ed.</i> 99; <i>Amb.</i> 356; 3<br><i>B. P. C. Ed. Toml.</i> 186. | (d) 14 <i>Sim.</i> 30.<br>(e) 2 <i>Atk.</i> 18. |
| (b) 2 <i>S. &amp; S.</i> 358.<br>(c) 1 <i>Beav.</i> 478.                  | (f) 2 <i>P. Wms.</i> 626.                       |

1860.

*July 9, 10.**Aug. 3.*Before *The  
LORDS JUS-  
TICES.*

A shipbuilder assigned to a creditor an unfinished ship, and agreed to complete it at his own expense, the value of the finished ship to be set off against an equal amount of the pre-existing debt. This ship-builder's course of trade was to build ships on his own account and sell them when completed. Before he had quite completed this ship he became bankrupt :—

*Held*, that the ship did not pass to his assignees as being within his order and disposition.

The creditor having filed his bill to establish his right to the proceeds of the ship (which had been sold without prejudice under an arrangement between him and the assignees), the assignees by their answer submitted, that the assignment did not pass the property in the ship, and that if it did, the ship passed to them as being within the order and disposition of the bankrupt; that the transaction was a mortgage and not a sale, and that it was not entered into for its ostensible purpose; but they did not raise the point that the assignment was a fraudulent preference, or otherwise objectionable on the ground of fraud :— *Held*, that the case of fraud or fraudulent preference was not open to them; and, per the Lord Justice *Turner*, it could not have been effectually raised without a cross bill; and as the assignees had had ample opportunities of investigating the case in time to raise the case of fraud by their answer, leave ought not now to be given to file a cross bill for the purpose of raising it.

## HOLDERNESS v. RANKIN.

THIS was an appeal by the Defendants from a decree of the Master of the Rolls establishing the title of the Plaintiff to the proceeds of a ship called the *Chinchas*.

The Plaintiff *Thomas Hunter Holderness* carried on business at *Liverpool* as a merchant and shipowner, in partnership with a Mr. *Chilton*. His brother *John William Holderness* carried on business as a merchant and shipbuilder at *Hull* in *England*, and at *Richibucto* in *New Brunswick*. His course of business was to build ships on his own account, and sell them when completed, and evidence was adduced to show that in the whole course of his previous business he had only built one ship to order. There were considerable business transactions between the firm of *Holderness & Chilton* and *J. W. Holderness*, in the course of which *J. W. Holderness* had become considerably indebted to *Holderness & Chilton*.

In

*Held*, that the ship did not pass to his assignees as being within his order and disposition.

The creditor having filed his bill to establish his right to the proceeds of the ship (which had been sold without prejudice under an arrangement between him and the assignees), the assignees by their answer submitted, that the assignment did not pass the property in the ship, and that if it did, the ship passed to them as being within the order and disposition of the bankrupt; that the transaction was a mortgage and not a sale, and that it was not entered into for its ostensible purpose; but they did not raise the point that the assignment was a fraudulent preference, or otherwise objectionable on the ground of fraud :— *Held*, that the case of fraud or fraudulent preference was not open to them; and, per the Lord Justice *Turner*, it could not have been effectually raised without a cross bill; and as the assignees had had ample opportunities of investigating the case in time to raise the case of fraud by their answer, leave ought not now to be given to file a cross bill for the purpose of raising it.

In October, 1857, *J. W. Holderness* having failed to make some payments which he had agreed to make in reduction of his debt, *T. H. Holderness* pressed him for payment or security. *J. W. Holderness* at that time was about building three ships at *Richibucto*, one of which, the *Chinchas*, was then about one-fourth finished, another not so much, and the third was not yet laid down. A negotiation then commenced, which ended in the execution of the indenture of the 16th of November, which is stated below. The evidence as to the state of the affairs of *J. W. Holderness* at this time was not very precise ; it was clear that he was in difficulties, but it did not appear whether he was insolvent, nor was it shown that the Plaintiff considered him to be so.

On the 16th of November, 1857, an indenture was executed, made between *J. W. Holderness* of the one part and *T. H. Holderness* of the other part, by which, after reciting that *J. W. Holderness* owed *T. H. Holderness* about 30,000*l.*, together with interest thereon, and having failed to make certain payments agreed upon to be made by the said *J. W. Holderness* to the said *T. H. Holderness*, and being desirous to have further time allowed him, the said *J. W. Holderness* in the then present year had agreed in manner thereafter mentioned ; and that *J. W. Holderness* was then building and intended to build, at his ship-yard and adjacent ship-yard at *Kingston (Richibucto)* in *North America*, three sailing vessels, that was to say, one of the burthen of one thousand and seven hundred tons, and another of the burthen of one thousand and three hundred tons, and another of the burthen of six hundred tons or thereabouts, and which three vessels were then in progress and building, or intended so to be ; and that *T. H. Holderness* was desirous of purchasing the vessels from *J. W. Holderness*, to which *J. W. Holderness* had consented

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sented and agreed on the terms and conditions thereinafter mentioned, it was agreed by and between the parties that the ships should be purchased, and were thereby purchased at the following rates, that was to say, the first ship at the rate of 6*l.* per ton, and the other two at the rate of 7*l. 10s.* per ton, builder's measurement, to be completed, fitted and found as was usual on the finishing and completing of new ships, and to be delivered to *T. H. Holderness* in one of the docks in *Liverpool*, without damage or expense; and that the said first-named ship, of the tonnage of 1,700 tons, should be launched, completed and despatched to *Britain* with a full cargo, on or before the 1st of *July*, 1858, the second ship of 1,300 tons on or before the 1st of *August*, 1858, and the third ship of 600 tons on or before the 1st of *September*, 1858. It was then recited that *J. W. Holderness* covenanted with *T. H. Holderness* that he *J. W. Holderness* would load at *Richibucto* the said three vessels with spruce and pine deals at the rate therein mentioned, and load and convey them by the three vessels at the freight of 4*l.* per *Petersburg* standard hundred, and that the amount of the said cargoes, as well as the said vessels, should be a set-off against the sum due to *T. H. Holderness*, or any further advances which might be made by the said *T. H. Holderness* under the firm of *Holderness & Chilton*. And by a second operative part it was witnessed to the effect that *J. W. Holderness*, in order to secure *T. H. Holderness* in the payment of the said sum due and further advances, granted, bargained and sold, assigned and set over to *T. H. Holderness*, his executors, administrators and assigns, the hulls of the said three ships then building, or thereafter to be built, in the ship-yard of the said *J. W. Holderness*, at *Kingston* aforesaid, together with the masts, spars, riggings, ropes, sails, iron, ironwork, blocks, chains and all other materials prepared or intended to be

be used in the construction, finishing, completing, rigging and equipping the three vessels for sea, of whatsoever description the same might be, and wheresoever situate; and also three to four million superficial feet of pine and spruce deals, then partly lying on the steam mill wharf of *J. W. Holderness*, at *Kingston* aforesaid; and also the logs of timber to be manufactured into deals at the expense of *J. W. Holderness*, his executors, administrators or assigns, to have and to hold the said three ships or vessels, the said deals, logs and all other the above-bargained premises unto *T. H. Holderness*, his executors, administrators and assigns, as his goods and chattels, from thenceforth for ever. And *J. W. Holderness* agreed with *T. H. Holderness* that he *J. W. Holderness*, his executors and administrators, would proceed with all despatch, and with the materials above mentioned, and such other as might be necessary, and with his workmen and at his expense, build, launch, equip and fully complete the three vessels for sea; and that the three ships should be launched, completed, loaded and despatched to sea on or before the 1st day of *September* then next, or as soon after as possible, and be delivered to *T. H. Holderness* in *Liverpool*. And *J. W. Holderness* further agreed that he would from time to time execute to *T. H. Holderness* such further agreements or writings as should be required by *T. H. Holderness*, or his agents or attorneys, for the purpose of more perfectly securing the vessels to him as collateral security for the payment of the advances so made, and would on launching each of the ships sign all such documents as might be necessary to have it registered in the name of *T. H. Holderness* or his nominee, or if required to be registered in the name of *J. W. Holderness*, that then he would execute a power of sale to *T. H. Holderness* for each of the ships, containing a nominal sum as the lowest rate at which such ship was to be sold. And *J. W. Holderness*

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*Holderness* further agreed with *T. H. Holderness* that on each of the vessels being launched and ready for loading he would put on board each of them a cargo of deals, to be provided by him, the first of which should be the deals above mentioned, the whole of which cargoes should be shipped for and be consigned to *T. H. Holderness* towards payment of the said sum of 30,000*l.*, and other advances which might thereafter be made; and it was also agreed that *T. H. Holderness* should be at liberty to insure the vessels while on the stocks against fire and against risk in launching, and to insure each ship and cargo for the voyage to *Britain*, at the costs and charges of *J. W. Holderness*.

*J. W. Holderness* was resident at this time in *England*, his business at *Richibucto* being managed by his agent *Mr. George Macleod*. Directions were sent out to *Mr. Macleod* to proceed with the ships, but the fact of the assignment was not communicated to him, nor, so far as it appeared, to any one; and evidence was adduced to show that *William Macleod*, a relation of *George Macleod*, advanced money to *George Macleod* for the purpose of completing the ships, in the belief that they remained the property of the bankrupt.

The *Chinchas* was launched on the 19th of *May*, 1858. *J. W. Holderness* became bankrupt on the 10th of *June*, 1858, and on the 19th the *Chinchas* was registered in the name of the Plaintiff, who had sent out a *Mr. Charles Brown* to take possession of her. It was a disputed question of fact whether *Mr. Brown* had taken possession of the vessel as agent of the Plaintiff before the bankruptcy, and whether he was not in reality merely the agent of the bankrupt, but the Court did not consider it necessary to determine either of these points.

In

In *July*, 1858, a person acting in *New Brunswick* on behalf of the assignees obtained from the Colonial Courts an injunction to prevent the vessel from being taken out of the jurisdiction. An arrangement was then entered into between the Plaintiff and the assignees that the vessel should be despatched to *Liverpool* and sold by a Mr. *Rankin*, and that the freight should also be received by him, without prejudice to any question, and that the rights of the parties should be determined by the English Courts. The bill was accordingly filed in the present suit, praying for a declaration that the *Chinchas* was the absolute property of the Plaintiff, and for payment to him of the proceeds of the sale and of the freight.

The assignees by their answer set out a letter of the 3rd of *November*, 1857, from the Plaintiff to *J. W. Holderness*, making an offer for the ships at 6*l.* per ton; and adding, "should I resell for more money, then you have the benefit to that extent." They further alleged that the assignment of the ships was obtained by the Plaintiff for the purpose of enabling him, if he thought proper, to obtain advances of money on the security of it from his bankers; that, at the date of the deed, the *Chinchas* was about one quarter finished, and that a small part of her timber and rigging was at that time appropriated to her; that scarcely any materials were appropriated to the *Flora Mac Ivor*, and none whatever to the third ship; and that in *April*, 1858, the Plaintiff wrote to *J. W. Holderness* a letter set out in the answer, in which he said, "you have given security on the three ships;" and the answer also alleged several instances of the Plaintiff's having spoken of his having "a security" on the ships. The answer also alleged divers circumstances to show that the registration of the *Chinchas* in the name of the Plaintiff was accomplished by means of fraudulent concealment

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concealment on the part of the Plaintiff, and submitted, "under the circumstances herein appearing, that the Plaintiff is not entitled to the said ship *Chinchas* or the earnings thereof, and that such ship was at the date of the bankruptcy of the said *J. W. Holderness* part of the property of the said firm of *Holderness & Macleod*, or if not, such property was at such date in the order and disposition of such last-mentioned firm with the consent of the true owners thereof."

The Master of the Rolls held, that the deed of *November*, 1857, was clearly sufficient to pass the property in the ships, and that the doctrine of reputed ownership did not apply; the case being that of an unfinished chattel left in the hands of the manufacturer for the purpose of being finished. His Honor held, that he could not enter into the further question which had been raised in argument, whether the deed of *November*, 1857, was void as a fraud upon the creditors; this question, for raising which a cross bill was in his Honor's opinion requisite, not being raised upon the pleadings at all. His Honor accordingly made a decree in the Plaintiff's favor with costs (a).

Mr. *Roundell Palmer*, Mr. *Charles Hall* and Mr. *Bardswell* in support of the decree.

We do not claim any benefit from the circumstance of the ship having been registered in the Plaintiff's name, for that registration having been effected after the bankruptcy could not alter the rights of the parties. The questions are, whether the deed of *November*, 1857, was sufficient to pass the property in the ships, and whether the doctrine of reputed ownership applies. [Mr. *Selwyn*: We do not dispute that, apart from fraud, the deed of

*November*,

(a) 28 *Beav.* 180.

*November*, 1857, was capable of passing the property in the ship; but we say that it is invalid on the ground of fraud.] We contend that the question of fraud is not open to the Appellants, for they have not raised it on the pleadings. There is not a single statement in the answer pointing at fraudulent preference or fraud of any kind; and even if there were, the instrument, confessedly effectual as a legal transfer of the property, could not be set aside, except upon bill filed for that purpose. We are not prepared fully to meet this question, which is not on the pleadings; but even taking the evidence as it stands, there is no case of unfairness proved. It is in evidence that in *November*, 1857, the Plaintiff believed the bankrupt perfectly solvent, and only took this security in consequence of the urgency of his partner; but even if he had suspected the approach of bankruptcy, the security would have been good, having been given solely in consequence of the pressure by the creditor; *Johnson v. Fesemeyer* (*a*). Then, as regards the doctrine of reputed ownership, we say that, having regard to the terms and nature of the contract, the leaving the ship in the hands of the builder until its completion is not within the rule; *Clark v. Spence* (*b*); *Muller v. Moes* (*c*). No false credit could be obtained in such a case, as it is the notorious practice of trade for makers to retain goods in their hands for the purpose of completion after they have ceased to be their property; and it is clearly the general course for ship-builders to build ships to order, and not on their own account, so that the possession of an unfinished ship by a builder raises no impression that it belongs to him; *Hamilton v. Bell* (*d*); *Smith's Merc. Law* (*e*); *Carruthers v. Payne* (*f*); *Dixon v. Yates*.

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| (<i>a</i>) 3 <i>De G. & J.</i> 13.
(<i>b</i>) 4 <i>Ad. & Ell.</i> 448, 463.
(<i>c</i>) 1 <i>M. & S.</i> 335. | (<i>d</i>) 10 <i>Exch.</i> 545.
(<i>e</i>) <i>Pages</i> 697, 700 (<i>6th ed.</i>)
(<i>f</i>) 5 <i>Bing.</i> 270. |
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Yates (a). The evidence, moreover, shows that if there ever was an apparent ownership in the bankrupt after November, 1857, it was determined before the bankruptcy.

Mr. *Hoare* appeared for *Rankin*, who took no part in the discussion.

Mr. *Selwyn*, Mr. *Eddis* and Mr. *Mellish* for the Appellants.

The two questions of fraud and reputed ownership run into each other. The business carried on by this bankrupt was not the repairing of ships nor the building ships to order, but the building of ships on his own account and selling them in this country. This was his uniform practice with only one exception. He bought some of the materials here and was accustomed to send out navigators to bring the ships to this country. The arrangement of 1857 was not a sale, it was in part in the nature of a mortgage to secure the Plaintiff's balance, for it was originally agreed that the bankrupt should have the benefit of a sale at an advanced price, and the deed itself shows that the transaction was one of security only. One of the ships was being built by another person for the bankrupt, but no mention was made to that person of the alleged change of ownership. The case comes within both the language and spirit of the enactment as to order and disposition. *William Macleod* was induced to advance money on the assumption that the ships belonged to the bankrupt. *Brown* was sent out in reality to act as agent to the bankrupt, not of the Plaintiff, and he continued to act throughout in the same capacity and was only nominally employed on behalf of the Plaintiff, so there was no change of possession. As regards

(a) 5 B. & Ad. 313.

regards the necessity for a cross bill, everything was left by agreement to be decided in equity, and the property being thus left in medio, the same strictness of pleading is not necessary as in cases where it is necessary to take a legal interest from the opposing party. The answer sufficiently raises the question of fraud, and states the facts on which the case of fraud is founded. But apart from fraud, the assignees must succeed on the ground of reputed ownership; *Hamilton v. Bell* (*a*); *Lingard v. Messiter* (*b*); *Knowles v. Horsfall* (*c*); *Ex parte Batten* (*d*); *Freshney v. Carrick* (*e*); *Hornsby v. Miller* (*f*). The doctrine, it is true, does not apply where goods of other persons are in the possession of a bankrupt in the ordinary course of his trade, but it was not in the ordinary course of his trade to have other men's unfinished ships in his possession, it being a distinct trade to build ships in the colonies and sell them here. The property did not pass to the Plaintiff as purchaser; if it had done so an amount of the debt equal to the amount of the purchase-money would at once have been struck out. The Plaintiff, in fact, took the ships as mortgagee till they were completed, and where personal chattels are assigned by way of mortgage, the doctrine of reputed ownership applies; *Brydon v. Wyley* (*g*); *Lingham v. Biggs* (*h*). To avoid the effect of the statute, there must be an actual change of possession, notice is not enough, and here there was no notice. Money was actually obtained by the bankrupt on the faith of his apparent ownership. *Ex parte Batten* (*i*), shows that the fact of a chattel being unfinished does not alter the case. *Clark v. Spence*, which is cited against us, went on the ordinary course

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| ( <i>a</i> ) 10 <i>Erch.</i> 545.            | ( <i>f</i> ) 28 <i>L. J., Q. B.</i> 99.      |
| ( <i>b</i> ) 1 <i>B. &amp; C.</i> 308.       | ( <i>g</i> ) 1 <i>Bos. &amp; P.</i> 83.      |
| ( <i>c</i> ) 5 <i>B. &amp; Ald.</i> 134.     | ( <i>h</i> ) <i>Ib.</i> 82.                  |
| ( <i>d</i> ) 3 <i>D. &amp; Chitty</i> , 328. | ( <i>i</i> ) 3 <i>D. &amp; Chitty</i> , 328. |
| ( <i>e</i> ) 1 <i>H. &amp; N.</i> 653.       |                                              |

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course of trade; *Miller v. Moss* in some degree appears to support the doctrine that the rule does not apply where possession is consistent with the agreement, but the point did not call for decision, the transfer having been notorious. In *Carruthers v. Payne* the owner had demanded the goods.

Mr. Roundell Palmer in reply.

It is urged against us that the transaction of November, 1847, took place in contemplation of bankruptcy, that there was a studied concealment of it, and that by such concealment *Macleod* was induced to make advances to enable the bankrupt to complete the ship. None of these points are in issue. The first point is not supported by the evidence, the answer does not set up any case of studied concealment, and there is no evidence that the Plaintiff had any notice that *William Macleod* was making advances. The case must be decided *secundum allegata et probata*; there is no reason for showing indulgence to the assignees, who must have had full means of knowledge before their answer was put in, and the arrangement for having the case decided in equity cannot obviate the necessity for a cross bill. Then as to reputed ownership, the property remained with the bankrupt for a special purpose and is not within the rule; *Joy v. Campbell* (*a*); *Dixon v. Yates* (*b*). The materials were sufficiently appropriated; *Woods v. Russell* (*c*); and *Reid v. Fairbanks* (*d*), shows that the property in them passed by the assignment. As regards the case attempted to be made that the Plaintiff was a mortgagee, the authorities only show that a mortgagee is in no better position than a vendee, not that he is in any worse position. As to the character of the bankrupt's business,

(*a*) 1 Sch. & Lef. 328.

(*b*) 5 B. & Ad. 345.

(*c*) 5 B. & Ad. 942.

(*d*) 13 C. B. 692.

business, there is no evidence to show that his was not the ordinary business of a shipbuilder, and any individual peculiarities in his mode of carrying on that business are immaterial. To support the Defendants' contention on this head it would be necessary to show that it is against the general course of a shipbuilder's business, not merely against the course of this individual's business, to have the possession of unfinished ships belonging to other persons.

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The Lord Justice Knight Bruce.

Assuming the agreement of the 16th of *November*, 1857, made between the Plaintiff and his brother the bankrupt (who was so adjudicated subsequently to *April*, 1858), and the transactions between them in the year 1857 subsequent to that agreement, to be not open to objection upon the ground of fraudulent preference or of any fraud, I think that the Plaintiff has shown a good title against the assignees under the bankruptcy to the ship in dispute. For there is here, as I conceive, no case of order and disposition, or reputed ownership, established. It may have been, and probably was, the ordinary course of the business of the bankrupt as a shipbuilder in *New Brunswick*, while he carried it on, to build ships on his own account only, and not for others. It may be that before this transaction "*The Conqueror*" was the only ship not built by the bankrupt for himself and on his own account. It may be that Mr. *Brown* acted with respect to the vessel in dispute as the agent merely of the bankrupt. Still I think that it was competent to the Plaintiff to purchase from the bankrupt the ship *Chinchas* while in an unfinished state, to contract with him for her completion, and in order to that completion

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completion to leave her as she was left in his ship-yard, without exposing the Plaintiff to the consequences alleged to result from the bankruptcy. Is then the agreement of *November*, 1857, or any part of the transactions that took place in that year, affected by the law against fraudulent preference or by fraud or unfairness of any kind? It seems to me that on the pleadings no such question is open, the answer of the Defendants the assignees not having, as I read or understand it, raised or suggested any such point. The decree appears to me right.

*The LORD JUSTICE TURNER.*

This case was remarkably well argued on the part of the Appellants. The argument at the time did not satisfy my mind that there was any error in the decree, and further consideration has fully satisfied me that the decree is right. The Plaintiff in this case claims under an assignment of a vessel, which was in part built, and which assignment was dated the 16th of *November*, 1857. *John William Holderness* was a ship-builder in *New Brunswick*. He was in the habit of building ships there, and sending them to this country for sale. At the date of the assignment, the ship *Chinchas*, which is the subject of the present suit, was in the course of being built, and appears to have been about one quarter finished. Another of the ships, which was afterwards called the *Flora MacIvor*, was building for *J. W. Holderness* in an adjoining yard belonging to a person of the name of *Sutherland*, and she was not so far advanced, but she had been laid down. The other ship was not laid down. *J. W. Holderness* having made this assignment on the 16th of *November*, 1857, afterwards became bankrupt in the month of *May*, 1858, and the Defendants, the present Appellants, are his assignees.

assignees. Disputes arose between them and the Plaintiff in respect of the title to this vessel, and to the freight which she had earned in coming from *New Brunswick* to *Liverpool*, and it was agreed between the parties that the ship should be sold, and the proceeds received and the freight also received by Mr. *Rankin*, who is one of the Defendants to this bill, and therefore stands simply in the position of a stakeholder. The Master of the Rolls has decreed in favor of the Plaintiff, and the Defendants the assignees have appealed from that decree.

The points which were raised upon the appeal were these, that there was fraud in the assignment of the 16th of *November*, 1857; that that assignment was fraudulent and void against creditors; and that whether the assignment was or was not fraudulent and void against creditors, these ships remained in the order and disposition of the bankrupt, and therefore passed to the assignees.

As to the first point, fraud in the assignment, there appear to me to be three questions. First, whether a cross bill was or was not necessary to raise the question of fraud? Secondly, whether the fraud is or is not put in issue by the answer? And thirdly, whether the fraud has been established? Upon the first of those three points I am of opinion that a cross bill was necessary to raise this question. The proceeds of this vessel, the monies in the hands of Mr. *Rankin*, represent the ship. It was not the purpose of the agreement under which the ship was sold at all to disturb the rights of the parties; and the rights of those parties, therefore, in the monies stand exactly as they would have stood in the ship, if the ship had remained unsold. Now it is not disputed that the assignment would pass the legal interest in the ship, and so long, therefore, as the deed stands, the Plaintiff has a title to the ship, and it is not

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according to the course of this Court to set aside a deed at the instance of a Defendant. One ground at least of that rule is this, that a Defendant is entitled to the benefit of his answer, and that no decree can be made upon the testimony of a single witness against the answer. That rule I understand still to remain, though the alterations in practice have rendered it less applicable than it formerly was. But although there is here no cross bill, I think it is quite necessary to consider whether the fraud is put in issue by the answer—whether the answer does or does not set up that this deed was fraudulent and void by reason of the insolvency of *J. W. Holderness* at the time, or of its being a fraud upon creditors; because if it should appear that it was so, and the answer has put that point in issue, the Court might undoubtedly at this time give leave to file a cross bill. I am of opinion, however, that this question of fraud upon the creditors is not sufficiently put in issue by this answer. The answer points to the deed being executed for a different purpose from that which was expressed upon the face of it, and the case is summed up in paragraph 55 of the answer in these terms:—"We submit under the circumstances herein appearing that the Plaintiff is not entitled to the said ship *Chinchas*, or the freight or earnings thereof, and that such ship was at the date of the said bankruptcy of the said *J. W. Holderness* part of the property of the said firm of *Holderness & Macleod*, or if not, such property was at such date in the order and disposition of such last-mentioned firm, with the consent of the true owners thereof." But upon looking through the rest of the answer, I find no allegation of any fraud contemplated upon the creditors of the bankrupt. There is nothing pointing to fraud on the creditors which I can find in any part of this answer. Even, however, if the answer had raised the question of fraud, if that had been distinctly alleged, I think

think that this would not have been a case for giving leave to file a cross bill now, for the assignees had full means of alleging the case. They had examined this gentleman under the bankruptcy. They had full means of setting up the case that the deed was fraudulent and void as against the creditors of the bankrupt, and as against the assignees under the bankruptcy, and they have not distinctly alleged that point. On the third point, the question whether fraud has been established; I am certainly by no means satisfied that any such case could be proved, even if leave were given to file a cross bill. This deed of assignment bears date in the month of *November*, 1857. The bankruptcy is not until *May*, 1858. There is no evidence of the state of the circumstances of the debtor at the time when the deed was executed. That he was in difficulties at that time there is no doubt, but it would be of the most dangerous consequences to hold that a trader in difficulties could not assign part of his property as a security for his debt. There is evidence that he had other property, which was, or was believed to be, considerable.

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The question, therefore, in my view of it, is reduced to the point of order and disposition; and I agree entirely with the Master of the Rolls on that point. The cases seem to me to be decisive upon it. The case is the case of an unfinished chattel remaining in the hands of the manufacturer. Remaining in his hands, it is there for the purpose of being finished; it does not remain in his order or disposition within the meaning of the statute. It remains with him, not to be ordered or disposed of, but to be completed. It was said that the mischief would be the same, because of the false credit which would be acquired by the trader by reason of the chattel remaining in his possession. But the world has no right whatever to assume that every ship in a ship-

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builder's yard is his own. The contrary is perfectly notorious. Ship-builders very rarely build for themselves; they build for others under orders given to them. It was attempted to distinguish this case on the ground of the particular trade. It was said that there was a particular trade between *New Brunswick* and this country, under which persons were in the habit of building ships in *New Brunswick* for themselves, and bringing them to this country for the purpose of sale, and that that was the particular habit of this gentleman, Mr. *J. W. Holderness*—that that was the course of his trade. The question, as I apprehend, depends not on the trade of the particular individual, but on the general course of trade; and there is no evidence whatever to show any such general course of trade as would affect this case. I am of opinion, therefore, that this case has been rightly decided. I doubted as to the costs. Probably, if the case had been before me in the first instance, I should not have thought it a case to give costs against the assignees; but the question of costs being one which peculiarly vests in the discretion of the Judge, I do not think that we ought to disturb the order in that respect. Exercising our own discretion, however, I think there should be no costs of the appeal. Dismiss the appeal without costs. The Defendant Mr. *Rankin* to be allowed his costs.

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**In the Matter of THE ELECTRIC TELEGRAPH  
COMPANY OF IRELAND, and**

**In the Matter of THE JOINT-STOCK COMPANIES  
WINDING-UP ACTS, 1848 and 1849.**

**BUNN'S CASE.**

THIS was an appeal from an order of the Master of the Rolls, by which Mr. *Bunn* was put upon the list of contributories of the *Electric Telegraph Company of Ireland* for 2,060 shares, and ordered to pay the costs of an application to remove his name from the list.

The object of the company was, the laying down an electric telegraph between *Ireland* and *Scotland*, and the company was provisionally registered in the month of *January*, 1852. In the month of *July*, 1852, the deed of settlement of the company was executed. By the 69th clause of this deed the directors were authorized to approve of transfers of shares. "And in case any such transfer shall be approved, and not otherwise, the directors shall forthwith cause a notice in writing to be sent

*June 27, 28,  
29, 30.  
July 2.  
Aug. 4.  
Before The  
LORDS JUS-  
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*G.*, a shareholder in a completely registered company, being in prison, two of the directors, being desirous to procure his discharge, entered into an agreement with *B.*, one of his creditors, by which *B.* agreed to accept 1,500 shares in part payment of his debt, and to consent to *G.*'s discharge; and

the two directors stated that they were authorized by *G.* and the company to transfer the shares, declared the shares to be transferable by delivery, and agreed that if it should appear that the shares could not be legally vested in *B.*, without his executing the deed of settlement, they would pay him 1,500*l.* They handed over to him scrip certificates for 1,500 shares, which described the company as only provisionally registered, and purported to be transferable by delivery. The directors placed *B.* on the register of shareholders without his knowledge, and in the register of transfers they entered the shares as transferred to him by *G.*, but it was not shown that any deed of transfer had ever been executed, and he never executed the deed of settlement, or any deed of accession to it. An order was afterwards made for winding up the company:—*Held* that, inasmuch as the shares in the company were not transferable by delivery, and could not be vested in *B.* without his executing the deed of settlement, *B.*, in the absence of conduct estopping him from disputing his being a shareholder, was not liable to be placed on the list of contributories.

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to the transferee apprising him of the same, and requiring him to come in and execute this present deed, or some deed of covenant referring thereto or duplicate thereof, within three calendar months from the date of such notice." The 81st clause was as follows:—"That immediately upon the execution of these presents, or such deed of covenant referring thereto, or duplicate thereof in manner aforesaid, the person executing the same, being a person duly entitled by original subscription or by transfer, election, nomination or otherwise in the manner hereinbefore mentioned, shall be forthwith entered on the register of proprietors, and duly returned for registration under the provisions of the statutes in that behalf made and provided and now in force, or any other statute that may for the time being be in force for that purpose, and such person shall thenceforth, but not before, assume the liabilities and privileges of a proprietor; and if such person be entitled in any of the representative capacities aforesaid, or as the nominee of any party so entitled, the dividends accruing on the share or shares to which such party or nominee of such party shall have been so entitled after the event on which such title shall have accrued, and before the execution of these presents, or such deed referring thereto or duplicate thereof, shall (unless forfeited under the 78th clause of these presents) be accumulated for and paid to the person so executing at the time of such execution; but in cases of direct transfer the former holder of the share in respect of which such execution is to be made shall, until such execution and registration as aforesaid, continue subject to all the liabilities, and be entitled to the dividends and all other privileges of a proprietor." The company was completely registered on the 4th of *December*, 1852.

A gentleman of the name of *William Lawrence Gilpin* was the contractor for laying down the wires of this company,

company, and he purchased the telegraphic wires which were necessary to be laid down from another company, called the *Gutta Percha Company*, in which Mr. *Bunn* was the junior partner. For those purchases Mr. *Gilpin* gave bills of exchange which were accepted by some of the directors of the *Electric Telegraph Company*, and in the month of *March*, 1853, those bills not being paid, Mr. *Gilpin* was arrested upon them and thrown into prison. He was also at the same time separately indebted to Mr. *Bunn*. The directors of the *Electric Telegraph Company* were very anxious to obtain his release, and negotiations accordingly took place for the purpose of coming to a settlement of the claims of the *Gutta Percha Company*, and of Mr. *Bunn*, upon the *Electric Telegraph Company*, its directors, and Mr. *Gilpin*. The result of these negotiations was, that upon the 9th of *April*, 1853, two agreements were entered into, each of which was signed by Mr. *Massey* and Mr. *Tweedie*, two of the directors of the *Electric Telegraph Company*, and was verbally acceded to by Mr. *Bunn*.

The first of these agreements was as follows:—

“ To the *Gutta Percha Company of Lambeth*.

“ Gentlemen,—In consideration of your agreeing to accept shares in the *Electric Telegraph Company of Ireland* to the amount of 1,500*l.*, in 1*l.* shares of that company, in part payment of the debt claimed by you for wire, and in consideration of your consenting to the discharge of Mr. *W. L. Gilpin* from custody, and of the arrangement this day made between us, we have handed to you 1,500 shares of 1*l.* each, paid up, in that company, to be held and disposed of as your own property, and which shares we are authorized by Mr. *Gilpin* and by the company to hand and transfer to you, and which 1,500 shares we declare to be good and valid shares, transferable by delivery, and entitling the holder to rank in

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in respect thereof as a shareholder in that company; and we also agree and undertake to procure the due execution of such transfer, if any, as may be necessary to give you a valid title to such shares; and if for any reason it should appear that such shares are not valid or cannot be legally transferred to and vested in you without your signing the deed of settlement of the company, we undertake to pay you the full sum of 1,500*l.* when required; and we also undertake for the considerations aforesaid to deliver to you on or before the 12th day of *April* inst., valid shares (which may be held or disposed of by you without signing the deed of settlement of the company) in such company to the amount of 220*l.*, or to pay you such amount of 220*l.* on that day. Dated this 9th day of *April*, 1853.

"Yours, &c.,

"Geo. Massey.

"J. Tweedie."

The other agreement was as follows:—

"To L. St. Lawrence Bunn, Esq.

"Sir,—In consideration of your agreeing to accept shares in the *Electric Telegraph Company of Ireland* to the amount of 340*l.* in shares of that company, in part payment of the debt due to you from Mr. *William Lawrence Gilpin* and *George Featherstone Griffin*, and in consideration of your consent to the discharge of Mr. *William Lawrence Gilpin* from custody, and of the arrangement this day made between us, we undertake, for the considerations aforesaid to deliver to you on or before the 12th day of *April*, valid shares (which may be held or disposed of by you without signing the deed of settlement of the company) in such company to the amount of the said sum of 340*l.*, in 1*l.* paid up shares in that company, or to pay you such amount of 340*l.* on that day. And we also hereby declare that we are authorized

rized by the said Mr. *William Lawrence Gilpin* and *George Featherstone Griffin*, and by the *Electric Telegraph Company of Ireland*, to hand and transfer such shares to you, and that the same shall be good and valid shares transferable by delivery, and entitling the holder to rank in respect thereof as a shareholder in the said company; and we also agree and undertake to procure the due execution of such transfer as may be necessary to give you a valid title to such shares, and if for any reason it should appear that such shares are not valid or cannot be legally transferred to and vested in you without your signing the deed of settlement of the company, we undertake for the considerations aforesaid to pay you the full sum of 340*l.* when required. Dated this 9th day of *April*, 1853.

"Yours, &c.,

"*J. W. Tweedie.*

"*George Massey.*"

Evidence was adduced that the *Gutta Percha Company*, when the proposal was first made to them that they should take shares in part satisfaction of their debt, objected to assuming the liability of shareholders, and only acceded to the arrangement on the faith of the representations that the shares were transferable by delivery.

Upon or soon after the day of the date of these agreements, certificates for 2,060 shares were delivered to Messrs. *Linklater*, who were the solicitors both of the *Gutta Percha Company* and of Mr. *Bunn*. These certificates were in the following form:—

"*Electric Telegraph Company of Ireland.*

"Provisionally registered. Capital 40,000*l.*, in 40,000 shares of 1*l.* each.

"This is to certify that the bearer hereof is the proprietor of      shares, Nos.      —      , in the capital stock

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stock of the *Electric Telegraph Company of Ireland*, subject to the regulations of the said company. Dated this day of ."

Each of these certificates was signed by two directors and countersigned by the secretary.

The greater part of these certificates having been delivered on the 9th of *April*, 1853, Mr. *Gilpin*, the contractor, on the 12th of *April*, 1853, executed the deed of settlement of the company for 2,065 shares. In the register of transfers of the company 2,065 shares were entered as having been transferred to Mr. *Bunn* on the 9th of *April*, 1853, from the names of Mr. *Gilpin*, the contractor, of Mr. *Griffin*, one of the directors, and of another Mr. *Griffin*, the secretary of the company. It did not appear in evidence that Mr. *Bunn* ever had anything to do with either of the Messrs. *Griffin*. There was no proof of any communication having been ever made to Mr. *Bunn* of the fact of these transfers having been made to him. It was not proved that any deeds of transfer had been executed, nor was there any evidence to show when the register of transfers in which his name was put was made up, the books of the company having been kept very irregularly and being in the utmost confusion. Mr. *Bunn's* name was also put upon the register of shareholders for 2,045 shares, a number not identical either with the number appearing in the agreements of the 9th of *April*, nor with the number mentioned in the register of transfers as having been transferred to him.

On the 4th of *August*, 1853, an act of parliament passed for incorporating this company, the 8th clause of which was in part as follows:—"Subject to the provisions of this act, the said deed of settlement shall from and after the passing of this act be wholly void and of none effect, and that the several persons who shall have executed

executed the same or any deed accessory thereto and their heirs, executors and administrators shall immediately from and after the passing of this act, stand and be by virtue thereof released and discharged from any future obligation to observe, perform, abide by, or fulfil or conform to the said deed of settlement, or the covenants or agreements therein contained, or any or either of them: provided always, that nothing herein contained shall release or discharge any person from any liability or obligation which may have been incurred prior to the date of the passing of this act, but such liability or obligation, and every liability or obligation in respect of any breach of the provisions of the said deed of settlement which may have been committed prior to the passing of this act, shall subsist and continue, and may be enforced accordingly under and according to the provisions of the said deed."

The 17th section of the act provided as follows:—

"That a memorial of the names and descriptions of the several shareholders of the company, in the form and to the effect for that purpose given or expressed in the schedule to this act annexed, shall within six months after the passing of this act be verified by the declaration of some director, secretary or officer for the time being of the company, made before a Master or Master Extraordinary in Chancery, and when so verified, inrolled in the High Court of Chancery in England, and that the like memorial of the name and description of every such shareholder for the time being of the company, in such form as aforesaid, shall in the month of *January*, 1854, and in the month of *January* in every succeeding year, or within twenty-one days thereafter, be verified by such declaration as aforesaid and also inrolled in the said High Court of Chancery. And when any person shall cease

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to be a shareholder, or when any person shall become a shareholder, a memorial of his name and description, verified in manner aforesaid, shall or may be forthwith inrolled in manner aforesaid in the form or to the effect expressed in the said schedule for that purpose; and if any declaration which shall be so made as aforesaid shall be false or untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor; and the inrolment of every such memorial shall be sufficient *prima facie* evidence that every person named in such memorial was at the date thereof such shareholder as in such memorial mentioned, or had ceased to be such shareholder as in such memorial mentioned."

On the 18th of *August*, 1853, notwithstanding the above provisions of the act making the deed void and substituting a different registration of shareholders for the registration which was in force before the passing of the act, the company made a return to the registrar of joint-stock companies, and in that return included Mr. *Bunn's* name as one of the shareholders of the company; and on the 1st of *March*, 1854, a memorial was also made under the private act, and Mr. *Bunn* was also included as a shareholder in that memorial. Mr. *Bunn* however deposed positively that he was not aware of any shares having been transferred to him or registered in his name until after the date of the order for winding-up the company, and this was not disproved. He attended meetings of the company, but accounted for this on the ground of the pecuniary interest which he had. The scheme having proved a failure no dividends ever were paid, and on the 7th of *May*, 1856, an order was made for winding-up the company. On the 11th of *June*, 1860, the order under appeal was made by the Master of the Rolls.

Mr.

*Mr. Roundell Palmer* and *Mr. E. F. Smith* for *Mr. Bunn*.

We contend in the first place that *Mr. Bunn* ought not to be a contributory in respect of any of the shares, on the ground that they were illegally registered in his name without his authority or knowledge. Our second point is, that as regards the 1,720 shares, the contract was not with *Mr. Bunn* but with the *Gutta Percha Company*, a firm consisting of six members, of whom *Bunn* was the junior, so that if the contract authorized a registration at all it authorized a registration in the name of the six but not of *Mr. Bunn* alone.

On the first point we say it is clear from the agreement of the 9th of *April*, 1853, that the shares which formed the subject matter of it were to be shares transferable by delivery; this element enters into the description of the shares throughout. Now the agreements must be looked at in connection with the statute 7 & 8 *Vict.* c. 110, under which the company was formed. By sect. 26 of that act, no person can obtain the legal status of a shareholder till he has executed the deed of settlement. *Neilson's Case* (a) shows that under this section there cannot be any transfer of shares by an allottee who has not executed the deed, though it is otherwise as to companies requiring the authority of parliament; *Young v. Smith* (b). The 54th section provides that transfers of shares shall only be by deed duly stamped; and by the 51st section certificates of shares in a prescribed form are to be given. Nothing like them had been given here. The transaction was intended to give an inchoate title with an agreement to complete it, which agreement might be enforced or not at the option of the person having the incomplete title. The mere registration of shares

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(a) 3 *D. G., M. & G.* 556.      (b) 15 *M. & W.* 121.

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**BURN'S CASE.** shares in a person's name without any authority does not make him liable; *Waterford, Wexford, &c. Railway Company v. Pidcock* (a); *Angas's Case* (b). If therefore there had been a transfer by deed to Mr. *Bunn*, which there was not, he still would not have been liable in the absence of antecedent authority or subsequent ratification. Then the 81st clause of the deed of settlement makes the execution of the deed necessary to constitute a proprietor, and the 44th prohibits his being put upon the register till he has executed it. These provisions show that Mr. *Bunn* was not a shareholder. The Master of the Rolls treated the transaction as a collusive attempt to do an impossible thing—to get the benefit of the shares without any of their burdens. In one sense no doubt this is impossible, it cannot be done by any contract between the company and the holder, but there is nothing to prevent its being done as between other parties. The transaction was an equitable assignment of shares without any contract express or implied, that the assignees should indemnify the assignor. The company have the assignor to look to, he remains liable to them till the transaction is complete, 7 & 8 Vict. c. 110, s. 13, and as regards them the contract is res inter alios acta. At the time when the contract was entered into *Gilpin* was not in a position to transfer his shares, so there could not have been specific performance even if the contract had been that Mr. *Bunn* should become a shareholder. And if it had been, and if *Gilpin* had had shares which could be so transferred, the company could not have enforced the contract. The case is similar in principle to a mortgage by deposit of a lease where the mortgagee does not become liable to the rent and covenants; *Moore v. Greg* (c). The Master of the Rolls drew

(a) 7 Ry. Cases, 437; 8 Exch. 279.

(b) 1 De G. & Sm. 560.  
(c) 2 Phill. 717.

drew the distinction that the present was more in the nature of a sale than of a mortgage, but that furnishes no sound distinction. Our arguments on this point is supported by *Jackson v. Cocker* (a); *Re Wrysgan Slate Company* (b); *Woodfall's Case* (c); *Newry, &c. Railway Company v. Moss* (d); *Fenwick's Case* (e); *Straffon's Executors' Case* (f); and *Ex parte Hall* (g). [The LORD JUSTICE KNIGHT BRUCE. Have there not been cases in which a person has been held to be a contributory though his legal title was incomplete?] Yes, but they were cases in which there was a contract between him and the company, as in the case of an allottee. *Ex parte Bowen* (h) shows the distinction between an incomplete contract with the company and with a stranger [*Pim's Case* (i) was also referred to]. The Master of the Rolls threw out the idea that this might be treated as a new allotment of shares, but there is nothing in the circumstances to warrant this. If there had been any contract to accept hitherto unallotted shares, the case would have been very different and might possibly have been governed by *Cookney's Case* (k), though even then if the company came to enforce the agreement they would have this difficulty, that they would be affected by equities arising from the conduct of the persons with whom the contract was entered into; *National Exchange Company of Glasgow v. Drew* (l); *Nicol's Case* (m). But this is dealing with a merely hypothetical case, the contract having no relation to any unissued shares but solely to the shares of *Gilpin*. It has been urged on the other side that Mr. *Bunn* acted

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| (a) 4 <i>Beav.</i> 59—66.                   | (g) 1 <i>Mac. &amp; G.</i> 307.         |
| (b) 5 <i>Jur. N. S.</i> 215.— <i>V.C.K.</i> | (h) 27 <i>L. T.</i> 297.— <i>V.C.W.</i> |
| (c) 3 <i>De G. &amp; Sm.</i> 63.            | (i) 3 <i>De G. &amp; Sm.</i> 11.        |
| (d) 14 <i>Beav.</i> 64.                     | (k) 3 <i>De G. &amp; J.</i> 170.        |
| (e) 1 <i>De G. &amp; Sm.</i> 557.           | (l) 2 <i>Macq.</i> 103.                 |
| (f) 1 <i>De G., M. &amp; G.</i> 576,        | (m) 3 <i>De G. &amp; J.</i> 387.        |

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as a shareholder, and so by his conduct estopped himself from denying that he was such. *Angas's Case* (*a*) bears upon this. In that case the husband had done acts very like those of a shareholder, but they were explained on the ground that he was acting for his wife. So here Mr. *Bunn* had an interest in the affairs of the company since he was to receive money from the shares, and everything that affected their value was of importance to him; it was natural therefore that he should intermeddle with its affairs without meaning to represent himself to be a shareholder. Stress is laid on his attending the meetings; but he attended meetings before the period at which he is alleged to have become a shareholder.

Mr. *Selwyn* and Mr. *Hamilton Humphreys* for the Official Manager.

This case is in substance the same as *Cookney's Case* (*b*), the question being whether the law allows a man to become a shareholder as regards benefits without taking his share of the burdens. If these shares had been sold, it is not disputed that Mr. *Bunn* would have received the purchase-money. He exercised all the rights of a shareholder except receiving dividends, which he did not receive only because there never were any. He attended meetings, which no one else did except shareholders or creditors of the company; he was not a creditor, and must be held to have treated himself as a shareholder by his attendance. As to the 1,720 shares, the question raised is a mere question between him and his partners. They may be liable to be placed on the list also, but that is no reason why he should be taken off. [*The LORD JUSTICE TURNER* intimated some doubt whether a person could be retained on the list if put on alone, when he ought to have been

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(*a*) 1 *De G. & Sm.* 560.

(*b*) 3 *De G. & J.* 170.

put on jointly with another person.] Great stress is laid on the incompleteness of the legal title. The same argument was urged in *Luard's Case* (a), but without success. There are only three positions in which a person may be as regards shares : he may have no interest, he may have an interest as mortgagee, or he may have an interest as owner. Here it is admitted that *Bunn* had an interest ; it clearly was not an interest as mortgagee ; he therefore must have had an interest as owner. [*The LORD JUSTICE TURNER* : Mr. *Bunn* agreed to take shares transferable by delivery. These shares were not so. May not that make a difference?] It is a common case for a person to take shares under a representation that there is limited liability ; but it has never been held that he thereby escapes the liabilities of a shareholder. [*The LORD JUSTICE TURNER* : Does it make no difference in that case whether the agreement to take shares has been completed or not?] The acts of acceptance here are enough to preclude any argument on that ground. *Cookney's Case* answers the whole argument on the other side. *Lord Mansfield's Case* (b), *Davidson's Case* (c), *Sanderson's Case* (d), *Price and Brown's Case* (e), and *Yelland's Case* (f) are all cases where the title was incomplete, and there had been all manner of informalities, yet the transferees were held contributories. And so in the case of *Straffon's Executors* (g), which was not, as is alleged on the other side, the case of an allottee. The position of the parties at the time of the arrangement does not tend to support Mr. *Bunn's* case. The directors were men of station ; the scheme was taken up *bonâ fide*, and was practicable ; the shares had a saleable

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| (a) <i>Ante</i> , vol. 1, p. 533. | (e) 3 <i>De G. & Sm.</i> 146. |
| (b) 2 <i>Mac. & G.</i> 57. | (f) 5 <i>De G. & Sm.</i> 395. |
| (c) 3 <i>De G. & Sm.</i> 21. | (g) 1 <i>De G., M. & G.</i> 576. |
| (d) <i>Ib.</i> 66; 3 <i>H. Lords Ca</i> 698. | |

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able value, and an arrangement that shares should be taken out and out in payment of a debt was a most natural thing. Then look at the contract, both as to what it is and what it is not. It contains an agreement to accept shares in part payment of a debt "to be held and disposed of as your own property," and which shares "we are authorized to hand and transfer to you," and they are declared to be shares entitling the holder to rank as a shareholder. Then as to what it is not. It is not a contract to take only *Gilpin's* interest, it is not a contract to stand as mortgagee or depositee, and it contains no contract that *Bunn* is to be under no liability—it contains nothing in favor of his contention except the mere stipulation that he was not to be obliged to sign the deed. Then as to subsequent acts. He was treated as a shareholder by having notices sent him, and he acted as a shareholder by attending meetings which he could not do as a creditor of the company, for he was not one. His grounds of defence are untenable. His objection that the required formalities were not complied with is disposed of by *Cookney's Case*. Then as to his being one of several partners, he dealt as agent for them all, and his was the only name given to the company. [*The Lord Justice Knight Bruce* here asked whether it was competent to Mr. *Bunn* to make an application to have the names of his partners put on the list along with his own. Mr. *Smith* referred to *Pim's Case* (*a*) as showing that the sole name must be taken off.] That case is distinguishable from a case where each party is personally liable in respect of his beneficial interest.

Mr. *Follett* and Mr. *Baggallay* for the creditor's representative.

Had *Bunn* gone to the office and said "register me,"
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(*a*) 3 *De G. & Sm.* 11.

he could not have contended that he is not liable. Instead of doing that, he did what came to the same thing, he contracted with *Massey and Tweedie* that they should do all acts necessary to make him the legal holder of the shares, and they have done them. They were his agents to register him. He never insisted on the alternative provision of the contract that they should pay him a certain sum if it was found that the shares could not be legally vested in him without his executing the deed. The contract has been performed, and Mr. *Bunn* cannot repudiate it because it subjects him to consequences which he did not foresee. It was not a contract with the company, and had it contained a stipulation that *Bunn* should be under no liability, the company would not be affected by such a stipulation.

Mr. Roundell Palmer in reply.

The other side say that the contracts in this case, taking them even without reference to subsequent conduct, bound *Bunn* to take a transfer into his own name of these shares, shares transferable in the books of the company, but not transferable by delivery without deed, and shares of which *Bunn* could have no benefit without executing the deed of settlement. This contention contradicts the express terms of the documents in all material points. The shares in question are totally different in nature from those for which *Bunn* contracted, and specific performance could not have been decreed against him. *De Castro's Case* (a) shows that even if it could, the company could not call for it. The provision in the agreements against signing the deed of settlement was intended to prevent Mr. *Bunn's* becoming liable to creditors, and it cannot be disregarded. It makes no difference that he contracted for something impossible.

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(a) 3 Jur. N. S. 1203.

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That he cannot have what he contracted for is no reason for compelling him to take something for which he did not contract. The company must take the contract as they find it; *Woodfall's Case (a)*. It is said that this may be taken as an allotment of shares, but that is completely opposed to the character of the transaction. The shares were shares fully paid up, which is inconsistent with the idea of a new allotment, and the terms of the agreement show that *Bunn* was to derive his interest from *Gilpin*. There is nothing like an agreement that he should take direct from the company. He has been put upon the list as transferee, not as allottee. Now did he agree to become a transferee? The other side rely on the expression, "agreeing to accept shares;" but this must be taken in connection with the other parts of the documents. It was at most nothing more than an agreement to take *Gilpin's* interest, which was equitable only, and an equitable interest may be given without any liability attaching on the donee; for the company having the original shareholder still to look to is not injured. It is impossible to make out from these documents any contract by *Bunn* to accept a legal transfer; and if there were any such contract, it would be invalid as against the policy of the act, *Gilpin* not being on the register; *Neilson's Case (b)*. No deeds of transfer to *Bunn* are produced or shown to have existed, and the want of a deed cannot be waived, at all events, at law, the terms of the act being express. None of the authorities cited by the other side under this head were under the same act; *New Brunswick and Canada Railway Company v. Muggeridge (c)*; *Moss v. Steam Gondola Company (d)*. In equity no doubt there is a difference, for there the intended transferee may be bound to do the

(a) 3 *De G. & Sm.* 63.(c) 4 *Hurst. & N.* 160.(b) 3 *De G., M. & G.* 556.(d) 17 *C. B.* 180.

the acts necessary to make him a shareholder; but that is an equity by way of specific performance. The old shareholders cannot get rid of their liability without a transfer by deed; they have no defence against being put on the list, and the official manager has no authority to elect that they shall not be upon the list, and that somebody else, to whom no regular transfer has been made, shall be there in their stead; *Ex parte Humby, re Wrysgan Slate Company* (a). In all cases where informalities have been held immaterial the transferee had done all he could do to make himself a shareholder. Here *Bunn* did not intend to be a shareholder; the object of the agreements was that he should have power to dispose of the shares, but not be legal holder. He looked upon them merely as a security. The unauthorized placing his name on the register did not make him a shareholder; *Bargate v. Shortridge* (b).

The cases relied on by the other side are divisible into three classes. The first class consists of cases relating to original allottees; *Lord Mansfield's Case* (c); *Yelland's Case* (d); *Cookney's Case* (e). These cases are wholly inapplicable. They were cases in which individuals had subscribed for shares and accepted allotments of them. They had thus entered into legal contracts with the company, and were held liable to be treated as shareholders on the ground that they were bound to carry out their contracts. The second class consists of one case; *Price and Brown's Case* (f). There, depositees of shares took in their own names certificates for shares of a new denomination in exchange for the old ones. The third class consists of cases relating to transferees,

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| (a) 5 <i>Jur. N. S.</i> 215— <i>V.C.K.</i> | (d) 5 <i>De G. &amp; Sm.</i> 395. |
| (b) 5 <i>H. Lords Ca.</i> 297.             | (e) 3 <i>De G. &amp; J.</i> 170.  |
| (c) 3 <i>Mac. &amp; G.</i> 57.             | (f) 3 <i>De G. &amp; Sm.</i> 146. |

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as to whom the due formalities had not been observed, and turn upon waiver, operating as an estoppel. In *Sanderson's Case* (*a*) the transferee had executed the deed. In *Straffon's Executors' Case* (*b*) the party had done all he could to make himself a shareholder. The case is explained in *Harrison's Case* (*c*). The acceptance of a transfer has the same effect as executing the deed, except that it does not create a specialty debt. *Maguire's Case* (*d*) proceeded on the same principle. [The LORD JUSTICE KNIGHT BRUCE here referred to *The Wolverhampton New Waterworks Company v. Hawkesford* (*e*)]. That case merely shows that an omission to register in due time does not enable a transferee to escape from liability. The cases on which the other side rely are therefore not decisive against us. It is quite consistent with the rules of law that a man may have an equitable interest in shares without any of the liabilities of a shareholder; *Galvanized Iron Company v. Westoby* (*f*); *Fenwick's Case* (*g*). Supposing we fail on the other grounds, still, as to the 1,720 shares, the course taken in *Pim's Case* (*h*) is the only proper one—to strike Mr. Bunn's name off the list, leaving the official manager to apply to have him put on the list jointly with his partners.

Judgment reserved.

*The LORD JUSTICE KNIGHT BRUCE.*

*Aug. 3.*

A company called “*The Electric Telegraph Company of Ireland*” was by an order dated the 7th of *May*, 1856,  
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| ( <i>a</i> ) 3 <i>De G. &amp; Sm.</i> 66; 3<br><i>H. Lords Ca.</i> 698. | ( <i>c</i> ) 5 <i>Jur. N. S.</i> 1104.<br>( <i>f</i> ) 8 <i>Erch.</i> 17. |
| ( <i>b</i> ) 1 <i>De G., M. &amp; G.</i> 576.                           | ( <i>g</i> ) 1 <i>De G. &amp; Sm.</i> 557.                                |
| ( <i>c</i> ) 22 <i>L. J., N. S.</i> 249, <i>Ch.</i>                     | ( <i>h</i> ) 3 <i>De G. &amp; Sm.</i> 11.                                 |
| ( <i>d</i> ) 3 <i>De G. &amp; Sm.</i> 31.                               |                                                                           |

directed to be wound up. Under this order various proceedings have taken place, including the case of Mr. *Cookney*, heard here in 1858, which Messrs. *De Gex & Jones* have reported. The order now under appeal, made by the Master of the Rolls on the 11th of *June* last, which is another of those proceedings, is in these terms—  
[His Lordship read the order.] Mr. *Bunn*, the present Appellant, complains of this order, contending that he is not properly a contributory.

The company was provisionally registered in *January*, 1852, completely registered in *December* of that year (a date perhaps material to be borne in mind), and regulated by an act of parliament which received the Royal Assent on the 4th of *August*, 1853, and is intituled “An Act for incorporating and regulating the *Electric Telegraph Company of Ireland*, and for better enabling the Company to establish and work Telegraphs in *Scotland* and *Ireland*, and between those Countries, and for other Purposes.” The Appellant stands charged as a contributory under a transaction which took place in the month of *April*, 1853, when a number of papers called, I believe, scrip certificates, purporting to represent shares in the company, were, in the circumstances to which I shall refer, placed in his hands or in the hands of his solicitor as agent for him, but so placed, as to part on Mr. *Bunn’s* private and separate account, and as to the rest on the account of Mr. *Bunn* as a member (which at the time he was) of a partnership called “*The Gutta Percha Company of Lambeth*.” These papers have been produced on the hearing of the appeal. I will read one of them, the form of which sufficiently represents all—[His Lordship here read one of the scrip certificates.] The grounds of Mr. *Bunn’s* defence before the Master of the Rolls and of his appeal here are substantially—first, that it was under an agreement with those who at the time managed and

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and conducted the affairs of the *Electric Telegraph Company*, that he should not, by reason or in respect of the shares or certificates, be liable for any debts or engagements of that company, but without any such liability be, as the holder of the shares, a participator in the profits, if any, of the undertaking, that he accepted them; and secondly, that, failing the first point, he is as to a certain number of the shares improperly charged alone as a contributory, because that portion of the shares was (he insists) taken by him jointly with other persons, who with him formed a mercantile establishment which I have mentioned already, called the *Gutta Percha Company of Lambeth*, and ought (he contends) to be joined with him in the liability imposed on him by the order, if he is justly liable at all. It appears that in *April*, 1853, Mr. *Gilpin*, a person much connected with this *Electric Telegraph Company*, was in prison, not at the suit of the Appellant, but for a debt for which the Appellant was liable, in effect as surety for Mr. *Gilpin*, to the creditor at whose suit Mr. *Gilpin's* person was detained, and it seems to have been the wish of those or of some of those acting at the time in the management of the affairs of the *Electric Telegraph Company* that Mr. *Gilpin* should be released from confinement, and accordingly in that month the two agreements in evidence, marked respectively A and B, were signed by two directors of the *Electric Telegraph Company*, namely, Mr. *Massey* and Mr. *Tweedie*, on behalf of the directors of that company, and verbally sanctioned and accepted by Mr. *Bunn* on his part. The two documents have been produced here by Mr. *Bunn* or on his behalf—[His Lordship here read the two agreements.] It was on this occasion and under these agreements that the scrip certificates already mentioned were, in *April*, 1853, and therefore during the interval between the complete registration and the private act, placed in the hands of Mr. *Bunn* or his agent, as I have

have stated. This was the origin, such the foundation, of Mr. *Bunn's* alleged connection with the *Electric Telegraph Company*.

Now it is perhaps to be reasonably inferred from the mere contents of the two agreements, but is, I think, sufficiently proved by collateral evidence, that they were entered into, and the shares to which they relate accepted, or contracted to be accepted, by Mr. *Bunn*, under a stipulation upon his part, to which Mr. *Massey* and Mr. *Tweedie*, on behalf of themselves and their fellow directors, acceded, that Mr. *Bunn* should not in respect of them, should not as a shareholder, be subject or liable to any of the debts or losses of the *Electric Telegraph Company*, but should only be a shareholder for the purpose of participating in its profits, if any. This stipulation, however, was, I think, beyond the functions and in excess of the powers as well of Messrs. *Massey* and *Tweedie* as of the whole body of the directors of the *Electric Telegraph Company* to make as against that company, which, as I conceive, was not bound by it; and as this portion of the arrangement of April, 1853, was, in my opinion, material and essential to its existence, was in my judgment a sine quâ non as far as Mr. *Bunn* was concerned, the two agreements were, I conceive, substantially good for nothing. Still it was possible for Mr. *Bunn* so to act as to preclude himself from rejecting the character of a member of the *Electric Telegraph Company*; and if, as for instance in *Maguire's Case* (a), he had received or derived any profit or benefit from that character or from the shares, or had caused damage or prejudice to the *Electric Telegraph Company* or any person by claiming or representing himself to be a shareholder, he might be so precluded and a contributory.

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tributary. But I do not find anything of the kind to have taken place. He certainly more than once claimed to be a shareholder, and he attended a meeting or meetings in that character, but not with any intention upon his part of acknowledging any liability or misleading any person ; and I repeat that, in my judgment, neither the *Electric Telegraph Company* nor any shareholder is shown to have sustained any damage by reason of conduct on his part subsequent to the transaction of *April, 1853*. I do not understand that any instrument of transfer to him of any of the shares has been signed by him or received or accepted by him, or with his permission, assent or privity made to him, nor has he ever executed the deed of settlement or any such instrument ; and though he has been by the directors returned and registered as a shareholder, that was not, as I understand the matter, under any authority from him, or with his consent or knowledge. I consider, therefore, that he has not barred himself from insisting on the equitable invalidity of the two agreements, or from insisting that he is neither legally nor equitably a shareholder ; the agreements having included a very important term that was impracticable and impossible, or was absolutely invalid, on which point he must, I think, be taken to have protected himself by stipulation, or acted in error. Whether the money received by him or the *Gutta Percha Company* on the occasion of the two agreements, on account of debt not treated as cancelled by the shares, ought to be restored, is a question that we cannot or need not, I think, now decide. With respect to the collateral evidence to which I have alluded, its admissibility was questioned, and is open to reasonable question. But in the particular position and circumstances of the case I consider it admissible, as it would be on the part of a Defendant against a Plaintiff seeking in this Court specific performance of a contract. Upon the contested

contested points in the present case on which I have not expressed, I wish to be considered as not giving, any opinion. But it seems to me that Mr. *Bunn* is not a contributory. I think, however, that he should neither pay nor receive any costs of the proceedings in the chambers of the Master of the Rolls, or in the Rolls Court, or here.

The LORD JUSTICE TURNER, after stating the leading facts of the case, proceeded as follows :

There is an enormous mass of evidence in the case, relating, first, to the constitution of the company; secondly, to what passed with reference to the agreements of the 9th of April, 1853; thirdly, as to the particular shares on which the Appellant was sought to be put on the list; and, fourthly, as to the conduct of the Appellant. In the view which I have taken of this case nearly the whole of this evidence may be laid out of the question. It seems to me that only the evidence which bears on the conduct of the Appellant is material to the grounds on which I have formed my opinion upon this case. There is no pretence whatever for saying, which is one of the points raised by Mr. *Bunn*, that this company was fraudulently constituted. What passed as to the agreements appears to me to be material only as to the question of costs. The agreements must speak for themselves, and the evidence as to the shares seems to me to go no further than to show that it is impossible that any reliance whatever can be placed on the books of this company. The case, according to the opinion which I have formed upon it, must be decided for the most part, if not wholly, on the documentary evidence. Now the Appellant undoubtedly is on the register, though there is no proof when the register was made up. I think that he must be *prima facie* liable, according

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ing to the 28th section of the Companies Clauses Consolidation Act, and it rests on him, therefore, to rebut this *prima facie* liability.

I first propose to consider how this question stands upon the company's deed of settlement. According to the provisions of the 81st section of that deed, it is upon the execution of the deed, and not before, that the person taking the shares is to assume the liabilities and acquire the privileges of a proprietor. Now the Appellant never did execute the deed of this company; therefore, upon the deed alone, he clearly is not liable. There was no partnership constituted *inter se*, no liability to contribute; and if, therefore, we look at this case as standing on the deed as between the parties claiming under that deed, it is plain to my mind that there was no liability contracted on the part of the Appellant.

It is not to be taken, however, that the Appellant may not be liable, though he did not execute the deed, and we must consider the question, therefore, upon the agreements which were entered into with the Appellant on the 9th of April, 1853. Now, no doubt there is considerable difficulty in construing these agreements, but when we look at the 81st section of the deed of the company, I think it becomes reasonably clear what was intended by them. The agreements very carefully provide that there shall be no execution of the deed of the company, therefore there shall be no liability according to clause 81 of that deed. It is true that the agreements contain an undertaking to procure the transfer necessary to give a title to the shares; but according to the deed, the transfer of itself would not give a title to the shares. There must be execution of the deed by the transferee after the transfer, before the title to the shares would be acquired. The 81st section is very strong upon that

that point, and the 69th is conclusive upon it. There is power given to the directors to approve transfers; "and in case any such transfer shall be approved, and not otherwise, the directors shall forthwith cause a notice in writing to be sent to the transferee apprising him of the same, and requiring him to come in and execute this present deed or some deed of covenant referring thereto, or duplicate thereof, within three calendar months from the date of such notice." This provision, therefore, to procure the transfer necessary to give a title to the shares, can mean no more than this, that the Appellant was to be put in the position in which he might, if he pleased, become a shareholder in the company. It is said that he agreed to accept the shares, because the first clause of the agreement is, "in consideration of your agreeing to accept the shares;" but then what shares were those which the Appellant agreed to accept? Why, plainly, only shares transferable by delivery; and the company having been completely registered, no shares could be so transferred. The agreement, therefore, was to effect what the law would not allow to be done. In determining whether the Appellant was or was not a contributory by virtue of those agreements, we must consider also how the case stands under those agreements. Those agreements are entered into by Messrs. *Massey* and *Tweedie*, two of the directors of this company. Where is the authority which Messrs. *Massey* and *Tweedie* had to bind their co-directors to those agreements? It may be said that the co-directors adopted the agreements, but that will only remove the difficulty one stage further; for where is the authority in the directors to bind the company by any such agreements? It was wholly beyond the power of these directors to do so. It was against the deed, and against the law, and the directors, therefore, plainly had no authority to bind the company to the agreements. Now the Master of the

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the Rolls seems to have considered that there was no difficulty in this respect, because he thought that the agreements would be held to apply to unissued shares; but the agreements do not say one word upon the subject of unissued shares. There is nothing to control their effect, and to say that the agreements shall be applicable only to unissued shares, and it is perfectly clear that the parties did not so understand them, for they proceeded immediately to deal under them with issued shares, and to carry them into effect by a transfer of shares which had been previously issued to *Gilpin* and the *Griffins*. I am unable, therefore, to agree with the Master of the Rolls in his conclusion, that those agreements had reference to unissued shares. If the agreements have not reference to unissued shares, what is the purport of the agreements? We must look to the substance of them as well as to the form, and I take the substance of these agreements to have been that the Appellant was not to execute the company's deed of settlement, for that is perfectly clear on the agreements, but yet that he was to have a beneficial interest in the shares. How could that be effected? The agreement, if it meant anything, must have meant this, that the persons in whose names the shares were to stand were to be trustees for the Appellant. There is no fraud or mala fides which I can see in such an agreement; and in the absence of fraud or mala fides a cestui que trust cannot, as I apprehend, be put upon the list of contributories. The trustee is the contracting party with the company. A cestui que trust may be liable to indemnify the trustee, but he is not liable to the company. Now, if the Appellant had been a party to the shares being put into the name of *Gilpin* or into the name of the *Griffins*, he might and very probably would, in my judgment, have made himself liable; but there is no evidence that the Appellant at all interfered in this part of the transaction,

transaction, and the case in this point of view seems to me to be no more than it would have been if the parties, in whose names the shares stood, had bonâ fide executed a declaration of trust in favor of the Appellant. Apart, therefore, from the conduct of the Appellant, I think that this order cannot be maintained, and looking to the Appellant's position, to his beneficial interest in the shares, under the trust which I apprehend was constituted in the person in whose name the shares were to stand, I do not think that there is enough in his conduct to estop him from saying that he is not liable in respect of these shares. I am of opinion, therefore, that this order must be discharged. I have felt some doubt about the costs; but the doubt has been whether they ought not to be thrown on the company, as to the fairness of whose dealings in this matter I am by no means satisfied. I think, however, that contrivances of this description ought not to be encouraged, and that the right course will be to give no costs on either side of any part of the litigation, but simply to discharge the order.

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**In the Matter of THE MEXICAN AND SOUTH
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COSTELLO'S CASE.

Nov. 3.

*Before The
LORDS JUS-
TICES.*

Although a shareholder in an abortive company (the shares in which pass by the delivery of scrip certificates) may transfer his shares to an insolvent, for the purpose of getting rid of liability, the transaction must be a real one and not a false or hollow contrivance.

Whether a bona fide transfer made some time after a petition for winding up the company under the Winding-up Act has been filed and advertised would be valid, *quare?*

THIS was a motion by way of appeal to discharge or vary an order made in the first instance at Chambers, and afterwards, on the 14th July, 1860, affirmed by the Master of the Rolls, directing the removal of the name of *Jacob Nunez Costello*, the Appellant's father, from the list of contributors, on which it had been placed in respect of 305 shares in the above-mentioned company, and the substitution of *Manuel Costello*, the Appellant, on the list instead.

The particulars as to the character and objects of the company, and the nature of its shares, are set forth in the report of *Grisewood and Smith's Case* (a). The shares were transferable by scrip certificate. The petition to wind up the company was presented and duly advertised on the 12th, and the winding-up order made on the 24th November, 1857.

At the date of the winding-up order the Appellant, Mr. *Manuel Costello*, carried on business on the *Stock Exchange* as a stock and share-broker. His father had formerly also carried on a trade of the same description, but having become embarrassed he had given up his business, and at the date of the transaction in question had become poor and entirely dependent on a weekly allowance made to him by his family, consisting of the Appellant and

(a) 4 *De G. & J.* 544.

and two other sons. Some time before the date of the winding-up order, *Manuel Costello*, being then the holder of the 305 shares in question, became aware that the company had become embarrassed, and that there might possibly be liabilities attached to the possession of the shares, he became anxious to get rid of those liabilities and sell the shares. He accordingly, on the 19th, put them into the hands of a broker named *Cohen*, desiring him to get a price for them in the market. The nominal price at that time quoted in certain share lists was 2*s. 6d.* per share, but it was found impossible to bring into the market anything like 300 shares at that price. *Jacob N. Costello*, though he had retired from the *Stock Exchange*, was then in the frequent practice of attending in the city and effecting small transactions in the purchase and sale of shares on his own account. Knowing that his son wished to dispose of the shares in question, he offered to purchase them from him at a small price, when *Manuel Costello*, finding that *Cohen* had failed to get a price for the shares in the market, on the 19th November, 1857, sold them to his father at the nominal price of 2*d.* or 3*d.* per share.

This sale was effected through *Cohen* as broker, the price paid for the shares being, according to the evidence of *Cohen*, part of the proceeds of a wager which had just been paid to the father. The son having received the money, handed it to Mr. *Cohen* for his commission, remarking that though he might himself have sold the shares to his father, the employment of a broker in the matter made it more regular. Mr. *Jacob Nunez Costello*, the father, afterwards, in his affidavit filed in the matter, deposed that he paid for the shares out of monies advanced and lent to him by his friends; and that, with the exception of the amount so paid, he had no other means whatever at that time, nor had he since that

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period been possessed of or parted with property of any kind or description whatsoever. And on his cross-examination he deposed that by friends he meant his sons. The two sons, other than *Manuel*, were not examined on either side.

The Appellant deposed to the effect that the transfer was intended to be a bona fide irrevocable transfer; that there was no indemnity nor agreement for an indemnity given by him to his father, nor any reservation or declaration of any trust in the Appellant's favor, nor any understanding that the shares were to be reassigned to him, or that the profits should belong to him, but that all profits and advantages to arise from the shares were to belong to the buyer; and he denied that any part of the purchase-money had been furnished to his father by himself.

It appeared also from the evidence of the father that he had been served with an order of the Master of the Rolls, requiring payment of a very large sum for calls due upon the shares in question, and that his sons were willing to give 20*l.* to procure his complete discharge from all liability as a contributory.

Sir *Hugh Cairns* and Mr. *Waley* for the Appellant.

It is now the settled law of this Court, that although a company, the shares in which are transferable by the mere delivery of scrip certificates, may be in extremis, a shareholder has a right to transfer his shares to any one, provided he does so out and out; and it matters not that the transfer was made for the express purpose of getting rid of his liability, or that the transferor knew that the shares were of no value, or that the transferee was a man of straw; *De Pass's Case* (a). But if the shareholder,

(a) 4 *De G. & J.* 544.

shareholder, instead of transferring out and out, contrives by means of the transfer to have the name of an insolvent put on the list, and by a secret arrangement with the transferee retains any possible benefit that may arise upon the shares, the transaction will not be allowed to stand; *Hyam's Case* (a); *Chinnock's Case* (b). The evidence in this case clearly shows that the transfer in question was a complete out and out legal transfer; that there was no reservation for the benefit of the transferor, and no agreement for the indemnity of the transferee. It makes no difference whether the consideration was paid out of a sum received by the transferee upon a wager or out of funds advanced by his family, or even out of an advance made by the Appellant himself.

Mr. Roundell Palmer and Mr. Roxburgh for the Official Manager.

It is not disputed that a bona fide out and out sale and transfer of these shares would, though made for the sake of escaping liability, have been effectual for that purpose; but we contend that, upon the result of the evidence, the transfer was not in this case a bona fide one; that it was a mere fable enacted by the parties to enable the son to get rid of his liability under the winding-up order. The onus of proving bona fides is upon the Appellant, and he has failed entirely to discharge himself from that onus. The decision in *De Pass's Case* (c) could not have been intended to apply to a transfer after the petition to wind up the company has been filed and advertised, and the company has thereby been brought to an end. If so all the solvent shareholders might, by assigning to insolvent transferees, render it impossible to discharge the liabilities of the partnership by means of the

(a) 1 *De G., F. & J.* 75.

(c) 4 *De G. & J.* 544.

(b) *Johns.* 714.

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the machinery of the winding-up acts. They cited also *Rowley v. Adams* (*a*).

Mr. *Southgate* for the creditors' representative.

Sir *H. Cairns* replied.

The LORD JUSTICE KNIGHT BRUCE.

At one period of the argument it appeared to me as probably desirable to see and hear the Deponents, or some or one of them. But the progress of the argument, coupled with the observation that on neither side, as I understand it, has any application been made to the Court for that purpose, has convinced me that that step is unnecessary. I am satisfied that we may safely dispose of this case upon the materials before us; and I am confirmed in that view by the circumstance which I have mentioned, namely, the absence of any application from the bar upon the subject.

I am not persuaded that the case of *De Pass* (*b*) was erroneously decided here, and I am not persuaded that were that case before us now for the first time my opinion would not be the same. Neither certainly am I persuaded that the case of *Hyam* (*c*) was erroneously decided. I think it was correctly decided, and the main reason for the decision there was that the transaction of the alleged sale, the alleged transfer, was a mere fiction, a mere device for the purpose of evading in an undue and improper manner the liability which the law perhaps afforded the means of removing or escaping from in a proper manner.

Here,

(*a*) 2 *H. of Lds. Ca.* 725.

(*c*) 1 *De G., F. & J.* 75.

(*b*) 4 *De G. & J.* 544.

Here, in my opinion, the transaction impeached by the Respondent's argument was a transaction entirely false and hollow. I am of opinion upon the evidence that there was no real bargain, no true contract, nothing approaching any idea of a substantial sale, but that the whole was an unfair device for the purpose of enabling the son to escape in an indirect and improper manner from a liability imposed upon him by law, by substituting in his own place a person who was unable to pay, and who would, in all probability, be assisted in any distress or difficulties, which might be occasioned to him by the alleged transfer, by the person who for his own purposes placed him in that position. It may be that even at the time when this transaction took place—it may be, I do not say that it was, but it may be—that even at the late time when this transaction took place a substantial sale made in good faith might have had the effect of relieving the Appellant. I repeat that in my judgment this was no substantial sale; this was no true contract, but was a mere shift; and to repeat the phrase which I used at the beginning, all was false and hollow. And upon whatever ground in particular the Master of the Rolls may have proceeded in this case, I think that his conclusion was clearly right.

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I also agree with his Honor in the conclusion at which he has arrived in this case. The question appears to me to lie between the case of *De Pass* (a) and the case of *Hyam* (b), and until corrected by a higher authority, I retain the opinion which we expressed in the former of those cases, that the mere circumstance of difficulty existing in a company where the shares are transferable

(a) 4 *De G. & J.* 544. (b) 1 *De G., F. & J.* 75.

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transferable by delivery does not prevent the holder of those shares from making a bona fide and effectual sale of them. I do not see how, when the contract between the partners is that each may transfer his shares, any one partner can have a right to complain of another for making that transfer at a time when the company may happen to be involved in difficulties. That was the principle upon which the case of *De Pass* (a) was decided, and by that principle I abide. I do not doubt, therefore the right to make a bona fide transfer of the shares, but I think that in all cases the transfer must be a bona fide transfer, using the words bona fide transfer in the sense that the transfer is not to be a mere colourable and unsubstantial transaction.

Now the facts of this case beyond all doubt throw upon the Appellant the proof of bona fides, and the question is whether he has satisfactorily discharged himself of that onus. I am of opinion that he has not done so. First, to look at the case with reference to the question of consideration. The shares are said to have borne in the market the value of half-a-crown per share, and this transaction takes place between the father and the son, without, so far as appears, any discussion between them as to the price to be paid for the shares. Without any discussion upon the subject of the price the sum of 2d. or 3d. per share (for the parties do not seem to be very well agreed upon that point) is taken as the price of these shares.

It is said that the question of consideration is immaterial, and that the son the vendor, the present Appellant, might have even paid to the father a sum of money to take the transfer of these shares. It may be so, but upon the question of the bona fides of the transaction what passed

(a) 4 *De G. & J.* 544.

passed upon the subject of consideration is certainly material. Then how did the father procure the money which he was to pay for the shares. The broker on the one hand states that at the time of the transaction the father told him he got the money through the medium of some wager or other transaction which he had entered into, but the father on the other hand states that he got it from his other sons. Here are different accounts, therefore, given by the parties to the transaction of the source from which the purchase-money was derived. Then again look at the intervention of the broker. The circumstance of the intervention of a broker is certainly not of itself a ground for suspecting fraud, but see what the reason assigned for the broker's intervention is. The son states it to have been to make the transaction more regular, which in other words means to give it a more honest appearance. Surely then the transaction must have been such as to require something to give it an honest appearance. Looking to the facts of this case, and more particularly to this, that the proof of the bona fides of the transaction rests upon the Appellant, I am of opinion that he has failed in establishing his case. This appeal, therefore, must be dismissed, and dismissed with costs.

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Re
THE MEXICAN
AND SOUTH
AMERICAN CO.
COSTELLO'S
CASE.



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*July 13, 16,
19, 20.
Aug. 3.*

Before The
LORDS JUS-
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*G. W., as ad-
ministrator
with the will
annexed of his
mother, was
entitled to a
mortgage of a
colliery, G. W.,
C. W. and N.
being entitled
in equal shares
to the mort-
gage money.
G. W. was
also receiver of
the colliery
and other es-*

*tates held under the same title, in a suit in which the title of the mortgagor was dis-
puted, and to which G. W. was a party as representative of his mother. This suit was
compromised in 1847, upon the terms that out of the profits of the colliery certain
yearly sums should be paid to Y., who claimed by a title paramount to the mortgage,
and that, subject to those payments, 20,000*l.* should be raised out of the colliery and
paid to G. W. in satisfaction of the mortgage, and provisions were made for letting
the colliery. In February, 1853, G. W. entered into an arrangement with Y. for the
purchase from him of the colliery and some other property. Up to this time the col-
liery had been a very losing concern. In May, 1853, N. filed a bill to have the
agreement of 1847 carried into effect, and in June, 1853, C. W. filed a bill to have it
declared that G. W. had made the purchase of February, 1853, as a trustee for the
persons interested in the 20,000*l.* In July, 1853, G. W. answered C. W.'s bill, setting
out the principal particulars of the agreement of February, 1853. In January, 1854,
N. filed a supplemental bill against G. W., C. W. and Y., treating the purchase as a
purchase made by G. W. for his own benefit, and seeking to establish that it had the
effect of postponing the yearly payments to Y. to the 20,000*l.* In February, 1855,
C. W. allowed his bill to be dismissed for want of prosecution. In April, 1855, a
decree was made in N.'s suit, establishing the priority of the annual payments over
the 20,000*l.*, and giving directions for raising the 20,000*l.* In June, 1855, G. W.
brought up N.'s rights under this decree. C. W., in October, 1857, filed a second
bill, to have it established that the purchase of 1853 was made by G. W. as a trustee
for the persons interested in the 20,000*l.**

Held, by the L. J. Knight Bruce, affirming the decision of V.-C. Wood, the L. J.
Turner dissenting, that C. W. had, by his conduct, disentitled himself to the relief
sought by his bill.

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THIS was an appeal by the Plaintiff from a decree of Vice-Chancellor *Wood*, dismissing with costs the

bill which was filed to establish that a purchase made by the Defendant *George Hammond Whalley*, of certain property consisting chiefly of mines, was to be treated as made in trust for the benefit of the Plaintiff and certain other persons.

The Plaintiff *Charles James Whalley* and the Defendant *George Hammond Whalley* were the sons of *Eliza-
beth Whalley*, who had died in 1840, entitled to large sums

sums of money, amounting to about 30,000*l.*, due on mortgages granted by *Edward Youde* of a colliery called the *Plas Madoc Colliery* and the other mines and minerals lying under the *Plas Madoc* estate, of which he claimed to be owner in fee. By her will she bequeathed her property to her executors and trustees therein named, upon trusts under which her two sons and her daughter *Mrs. Nicholson* became entitled to her residuary personal estate in equal shares. Upon her death her trustees and executors renounced probate and disclaimed, and letters of administration with the will annexed were granted to the Defendant *G. H. Whalley*.

Not long before *Mrs. Whalley's* death a suit of *Youde v. Jones* had been instituted by *Edward Youde* against his sister *Julia Youde* and others, for the purpose of settling their rights to the *Plas Madoc* and other estates, the construction of the instruments upon which the title depended being doubtful. *Mrs. Whalley* was made a Defendant to this suit. *G. H. Whalley* was appointed receiver of the rents of the estates in question, including the mortgaged colliery, and after *Mrs. Whalley's* death the suit was revived against him as her personal representative. On the 29th of April, 1845, a decree was made, the result of which was to establish that the mortgagor was not owner in fee, but had only a life estate in the whole property, including the colliery. The mortgagor and *G. H. Whalley* appealed, but before the appeal had been heard the mortgagor died, and after his death an agreement of compromise was entered into, dated the 20th of September, 1847.

This agreement was made between the Defendant *G. H. Whalley*, Mr. and Mrs. *Nicholson* and the Plaintiff of the one part, and the persons who according to the decree were now the only persons interested in the property

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perty of the other part. It stated the particulars of the securities to which *G. H. Whalley*, as the administrator of his mother, claimed to be entitled upon the estate, and it was thereby among other things agreed to the following effect:—

That out of certain funds in Court in *Youde v. Jones*, and out of the balance of rents in the hands of *G. H. Whalley* as receiver, the sum of 3,000*l.* should be retained by or paid to *G. H. Whalley* as such administrator as aforesaid, in part satisfaction of the monies due to him as such administrator upon his securities.

That *G. H. Whalley* as such administrator should also be entitled to 20,000*l.*, to be raised out of the rents and profits of the colliery and mines under the *Plas Madoc* estate, with interest at 3*l.* per cent. from the 1st of *October* then next.

That the parties should endeavour to procure to be granted by all necessary parties a lease of the colliery to *Gomer Roberts*, the then occupier, or to any other person who might afterwards become lessee, at the rent of 2,500*l.*, and such further rent by way of royalty on the minerals, and upon such terms, as had been agreed upon between *G. H. Whalley* and *Gomer Roberts*, and were contained in a letter from *Gomer Roberts* dated the 30th of *March*, 1846, or such other terms as might afterwards be agreed upon between the parties and any other lessee.

That *G. H. Whalley* as such administrator should receive the rents and royalties from such leases, make thereout to *Julia Youde* or other the person or persons for the time being beneficially entitled to the rents of the *Plas Madoc* estate under the will of *T. W. Youde* certain yearly payments varying in the events therein mentioned,

tioned, but not less than 1,000*l.* per annum and not more than 1,500*l.* per annum, and apply the residue in payment of the said principal sum of 20,000*l.* and the interest thereon, and that the sums by this agreement made payable to *G. H. Whalley* were to be taken in satisfaction of all claims under the securities.

*G. H. Whalley* received the 3,000*l.* and paid one-third of it to the Plaintiff and another third to Mr. and Mrs. *Nicholson*.

On the 29th of *September*, 1848, the proposed lease was granted to *Gomer Roberts* along with two other persons. It soon became apparent that *Gomer Roberts* would not be able to continue the working without some assistance. In *March*, 1849, *G. H. Whalley* wrote to the Plaintiff asking his opinion as to what should be done, and the Plaintiff sent a reply declining to interfere in any way. In *August*, 1849, *Gomer Roberts* became bankrupt, and the colliery was given up. The Defendant *G. H. Whalley* thereupon entered into possession of the mines and carried on the working of them, with the view of keeping them going till an opportunity should occur of letting them to advantage. In *February*, 1851, he succeeded in letting part of them to the *British Iron Company*, and shortly afterwards let a small part to a private individual, and continued to work the remainder himself till *August*, 1852, when he let them from month to month to a tenant as a temporary arrangement until a negotiation for a lease of the bulk of them to the *British Iron Company* could be concluded. During the whole of this period the results were unfavorable, and left *G. H. Whalley* considerably out of pocket, he having incurred considerable expenses as to the construction of a branch railway and otherwise, with a view to rendering the mines ultimately productive. He had also made payments

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ments to the *Youdes* in respect of the annuity which under the agreement of 1847 was payable out of the proceeds of the mines, and in *January*, 1853, he alleged that, as between him and the *Youdes*, the property was indebted to him in a large sum in respect of payments made by him on account of the annuity, beyond the income derived from the mines and applicable to the payment of that annuity.

Under the above state of circumstances *G. H. Whalley* entered into negotiations with the *Youdes* with a view of obtaining such a further interest in the property as would enable him to deal with the mines to greater advantage, and in *January*, 1853, his solicitor wrote letters to Mr. *Nicholson* and to *C. J. Whalley*, part of which was as follows:—"I think it right to inform you that Mr. *Whalley* has entered into an arrangement with Miss *Youde* and her family for the purchase of their interest in the *Plas Madoc* estate, including the mines. You are aware that, in consequence partly of the circumstances of the colliery and partly from an unwillingness to make any permanent arrangements without your concurrence, accompanied, as your refusal has been, by intimations that you had some views of the proper course to be pursued different from those acted upon by Mr. *Whalley*, but which views he states that you never distinctly communicated to him, that the colliery has been carried on under the greatest possible disadvantages. . . . Having arrived at the close of another year, and Miss *Youde* declining any longer to be a party to the working of the mines, it being obvious that, if the working is now stopped the prospects of realizing any portion of the charge due to Mrs. *Whalley's* estate would be indefinitely postponed, Mr. *Whalley* has acceded to the arrangement for the purchase above mentioned, whereby he hopes to be enabled to make such provisions for the proper

proper working as will prevent that result." No answer was returned to this letter.

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On the 5th of *February*, 1853, an agreement was entered into between the *Youdes* of the one part, and *G. H. Whalley* of the other part. This agreement recited, that under and by virtue of the will of *Thomas Watkin Youde*, esq., deceased, and otherwise, the said parties thereto of the first part, or some or one of them, were or was seised of certain estates in the counties of *Denbigh* and *Montgomery*, and of certain mines and minerals lying under the surface of the said estates, or part thereof, subject to certain mortgages and charges thereon, and that the said estates and mines having been for many years involved in certain chancery suits, certain arrangements had been made by an agreement dated the 20th day of *September*, 1847, and made between the said several parties thereto and others, for terminating the said suits, and that by an order of the Court of Chancery all further proceedings in the said suits were stayed accordingly; and that *G. H. Whalley*, who was the receiver appointed by the Court of Chancery, having made various advances in money to the parties thereto of the first part, and having laid out various sums of money in improving the said mines and the works connected therewith in making a branch railway on part of the same, and otherwise in relation to the same estates, it was, by an agreement dated the 26th day of *May*, 1851, and made between the said several parties thereto, amongst other things mutually agreed that the said *G. H. Whalley* should continue to receive all the rents and profits of the said estates and mines until he had been fully paid all sums due and owing to him individually, and in respect of his own personal advances, upon the terms and in manner thereafter expressed. It was further recited that *G. H. Whalley* had expended various further

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further sums of money in carrying on the said mines and works, or otherwise in relation thereto, and in making a branch railway and otherwise relating to the said estates, and in payments and advances to the said parties thereto of the first part, or some or one of them, and the said *G. H. Whalley* claimed to be due to him up to the 1st day of *January*, 1852, the sum of 12,000*l.*, or thereabouts, on account of his individual payments and advances in respect of the said estates, monies, and works, over and above the monies he had expended and was become liable to pay since the said 1st day of *January*, 1852, and as to which the accounts of the said *G. H. Whalley* had not yet been fully made out, and that the parties of the first part had not fully examined the accounts of *G. H. Whalley* in respect of the sums claimed by him, and had not settled the same, but it had been agreed between the parties that in order finally to settle and compromise all matters, accounts, differences and things between the said parties thereto of the first part, and *G. H. Whalley*, certain arrangements should be made between the parties in manner hereinafter mentioned.

The agreement then proceeded to provide as follows :—

First, that 5,000*l.* should forthwith be raised by mortgage of the *Plas Madoc* estate and mines and the tithes of *Christronydd Kenrick* and the *Ruthin* estate and the *Llangerrig* estate, and that 5,000*l.* should be paid to *G. H. Whalley* on the execution of the mortgage, and that he should if necessary concur in such mortgage.

Secondly, that the *Plas Madoc* estate and mines, and the tithes of *Christronydd Kenrick* and the *Ruthin* estate, should on or before the 1st day of *April* then next be conveyed to *G. H. Whalley* in fee, subject to certain specified mortgages then affecting the same, and also

also to such further mortgage or mortgages as might be necessary for raising the said sum of 5,000*l.* and all other mortgages and incumbrances affecting the same estates.

Thirdly, that *G. H. Whalley* should within two years from the 1st of *January*, 1853, procure the release of the *Clockfan* estate (except that part of it called the *Tweaderisker Farm*) from all the mortgages affecting it, including the said mortgage for 5,000*l.*, and that at the time of the execution of the conveyance of the *Plas Madoc* estate and other estates to the said *G. H. Whalley* he should execute to the said parties of the first part a mortgage of the *Plas Madoc* and other estates so to be conveyed to him as aforesaid, for the purpose of charging the same exclusively with any monies which the *Clockfan* estate was then charged with, including the said 5,000*l.* and all expenses in respect of the same and in exoneration of the *Clockfan* estate.

Fourthly, that *G. H. Whalley* should at the time of the execution of the conveyance to him of the said estate execute a general release to the said parties of the first part of all claims and demands which he had against the parties of the first part, or any of them.

Fifthly, that on the execution of the conveyance as aforesaid to *G. H. Whalley* of the *Plas Madoc* and other estates, the said parties of the first part would grant to *G. H. Whalley* a lease of the *Clockfan* estate, (except *Clockfan House*, garden and premises,) for the term of sixty-one years from the date of the conveyance, at the rent of 950*l.*, with liberty to open and work quarries and mines upon the terms therein mentioned.

Sixthly, that the parties of the first part, or the survivors or survivor of them, should be at liberty to take a lease

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lease from *G. H. Whalley*, and *G. H. Whalley* agreed to grant to them if required a lease of fifty acres of land or any smaller quantity which they, he or she might require near or adjoining *Clockfan House*, for such term of years as they, he or she might think proper, subject to the payment of a fair rent.

Seventhly, that at the time of the execution of the above release by *G. H. Whalley* of all his claims, the *Twederisher Farm* should be conveyed subject to such mortgages and incumbrances as then affected the same, and which were estimated to amount to its full value, to *G. H. Whalley* in fee.

Eighthly, that *G. H. Whalley* should, within five years from the 1st of *January*, 1853, lay out in improving the *Clockfan* estate enough to raise its annual value to 950*l.*

Tenthly, that in the event of the parties of the first part or their heirs being desirous of selling their interest in the *Clockfan* estate, or any portion thereof, within twenty-one years, *G. H. Whalley*, his executors, administrators or assigns, should have the right of pre-emption, and in case of dispute the terms and price should be settled by arbitration in the usual way.

The twelfth clause provided for *G. H. Whalley* receiving certain arrears of rent, and discharging all outgoings during the same period.

Fourteenthly, that on the execution of the conveyance of the *Plas Madoc* estate *G. H. Whalley* should enter into a covenant to indemnify the parties of the first part from all claims and demands of the Plaintiff and Mr. and Mrs. *Nicholson*, under the agreement of the 20th of *September*, 1847.

Fifteenthly.

Fifteenthly, that the conveyances to *G. H. Whalley* should be made to and accepted by him, subject to the then present tenancies and agreements, and also subject to the agreement of the 20th of *September*, 1847; and *G. H. Whalley* should at the same time indemnify the parties of the first part against all liabilities under those agreements.

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Seventeenthly, that *G. H. Whalley* should accept the title of the parties of the first part to the said estates agreed to be conveyed to him as aforesaid, without any further investigation.

Eighteenthly, that in the event of this arrangement not being fully carried out by reason of any default of *G. H. Whalley*, then the agreement should be void, except that the payment of the said sum of 5,000*l.* should operate as a full discharge and release of all the individual claims and demands of *G. H. Whalley* against the parties of the first part, or any of them, in respect of the subject-matters of the agreement; and except that *G. H. Whalley* should be entitled to retain for his own benefit all sums of money which should then have become due in respect of the *Plas Madoc* estate and mines and the *Ruthin* estate and the tithes of *Christonydd Kenrick*, he paying all sums and claims payable out of those estates, or in respect thereof.

Nineteenthly, that pending the arrangements for carrying this agreement into effect the rents and profits of the estates should be applied in the same manner as they would be applicable on the completion of such arrangements, and in particular the parties of the first part should be entitled to receive from *G. H. Whalley* the sum of 950*l.* a year for the rent of the *Clockfan* estate from the 25th of *December* then last.

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Twenty-first, that *G. H. Whalley* should pay all costs incident to the agreement and the completion of the arrangement thereby contemplated.

On the 4th of *June*, 1853, an agreement was concluded with the *British Iron Company* for a lease to them of the bulk of the mines, the fixed rent being 1,500*l.* per annum; but the agreement was made subject to a provision giving them power to determine the tenancy by giving a year's notice and paying down 2,000*l.* By this agreement the company was exempted from various restrictions to which *Gomer Roberts* had been subject, as to injuring the surface of the *Plas Madoc* estate, and obtained more extensive powers than he had of using the railways and tramways on the estate; and these privileges were afterwards further extended by a subsequent agreement of *September*, 1856.

In the meantime, in *May*, 1853, Mr. *Nicholson*, as the personal representative of his wife, who had died in 1849, filed his bill against *G. H. Whalley* and *C. J. Whalley*, seeking relief on the footing of the agreement of *September*, 1847, and asking to have all the payments made by *G. H. Whalley* while in possession of the colliery disallowed, on the ground that his occupying it was unauthorized.

On the 14th of *June*, 1853, the Plaintiff filed a bill setting out the agreement of the 20th of *September*, 1847, and complaining among other things of *G. H. Whalley* having been in possession of the colliery instead of letting it. The bill charged by the 30th paragraph that the Defendant *G. H. Whalley* alleged, as the facts were, that he had contracted for and had purchased, and that under and by virtue of certain deeds and assurances, the dates and other particulars whereof the Plaintiff was unable

unable to set forth, there had been conveyed to him all the estate and interest of the *Youdes* in the colliery and the *Plas Madoc* estate, and that the *Youdes* had no longer any interest in the property, and that *G. H. Whalley* further alleged that in consequence of the refusal of the Plaintiff and *Nicholson* to co-operate with him in working the colliery, he was entitled to put an end to the agreement of 1847. By the 33rd paragraph, the Plaintiff set up the case that *G. H. Whalley* had availed himself of his position as trustee and receiver to make the purchase, and that he ought to be taken to have made the purchase as a trustee for the persons interested in the 20,000*l.* The bill prayed for a specific performance of the agreement of *September*, 1847; for a declaration that *G. H. Whalley* was not entitled to work the mines, and that *G. H. Whalley* might be charged with an occupation rent; that it might be declared that *G. H. Whalley* made the purchase as a trustee, and that for the purpose of ascertaining the amount of contribution to which *G. H. Whalley* was entitled in respect of the purchase, the date and full particulars thereof might be ascertained, and an account be taken of all payments and allowances made by him to the *Youdes* in respect thereof. The rest of the prayer is not necessary to be noticed.

On the 22nd of July, 1853, G. H. Whalley put in his answer to the last-mentioned bill, setting forth the most material parts of the agreement of 1853, but not disclosing what the properties were to which the agreement related other than the *Plas Madoc* estate, nor the facts relating to the lease of *Clockfan*, nor the 18th clause enabling the *Youdes* to determine the agreement on any default by G. H. Whalley.

In September, 1853, Nicholson died. His suit was  
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revived by his executors, who had taken out administration to the estate of Mrs. Nicholson, and in *January*, 1854, they filed a supplemental bill against *G. H. Whalley, C. J. Whalley* and the *Youdes*. This bill prayed that the agreement of *September*, 1847, might be carried into execution; that it might be declared that *G. H. Whalley* and *Julia Youde* were not entitled to be paid out of the income of the colliery any arrears of the yearly sums reserved to the *Youdes* by that agreement, and that it might be declared that such yearly sums had ceased to be payable, or that the payment thereof ought to be postponed to the $20,000l.$; that *G. H. Whalley* might be charged with an occupation rent, and with the full value of all minerals which he had gotten; that an account might be taken of rents and royalties received by him, and for a receiver.

This supplemental bill proceeded on the footing, not that *G. H. Whalley* had, by the agreement of 1853, effected a purchase to the benefit of which the cestuis que trust of the $20,000l.$ were entitled, but that he had become owner of the estate, subject to that charge, by a dealing of such a nature that the prior incumbrance to which the *Youdes* were entitled under the agreement of 1847 had, according to the principle of *Toulmin v. Steere* (a), lost its priority. These suits of *Nicholson v. Whalley* were ready for hearing in *December*, 1854.

The Plaintiff *C. J. Whalley* had amended his bill in *June*, 1854, under an order dated the 11th of *May*, 1854, but had subsequently taken no material step in his cause. On the 26th of *January*, 1855, the Defendant in his suit moved to dismiss for want of prosecution, and the usual order was made, except that a somewhat longer

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time than usual was allowed for filing a replication. The Plaintiff did not file his replication, and in *February, 1855*, the bill was dismissed.

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On the 28th of *April, 1855*, a decree was made by the Lords Justices in the original and supplemental suits of *Nicholson v. Whalley*. The supplemental bill was dismissed as regarded the claim to charge *G. H. Whalley* with an occupation rent and with wilful default, and the priority of the yearly sums payable to the *Youdes* under the agreement of 1847, over the 20,000*l.*, was declared. An account was directed of what was due in respect of the above yearly payments, and in respect of the 20,000*l.* and interest; also an account of rents, royalties, and monies arising from the sale of minerals, received by *G. H. Whalley*, and an account of monies paid by *G. H. Whalley* in respect of the above yearly payments. And the Court being of opinion that the conduct of *G. H. Whalley* in working the mines while unlet was proper, divers accounts and inquiries were directed as to the expenses incurred by him in relation to the working, repairing and improving the mines, and providing them with machinery; and it was declared that what, if anything, should be found due to him on the balance of the above accounts ought to be paid out of the rents and profits in priority to the 20,000*l.* and interest.

Soon afterwards *G. H. Whalley* entered into a compromise with the Plaintiffs in the supplemental suit of *Nicholson v. Whalley*, and such compromise, in *June, 1855*, was approved by the Master of the Rolls, to whose Court the cause was attached. *C. J. Whalley* was aware of this compromise before it was approved by the Master of the Rolls, and objected to it. After this compromise no further proceedings were taken in the suits of *Nicholson v. Whalley*.

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On the 6th of October, 1857, the Plaintiff *C. J. Whalley* filed his present bill against *G. H. Whalley* and *Nicholson's* executors, praying that it might be declared that *G. H. Whalley* made the purchase of 1853 as a trustee for and on behalf of the persons interested in the mortgage debt of 20,000*l.*, and for relief consequent on such declaration, with a prayer in the alternative, of which the material part was, that if the Court should be of opinion that *J. H. Whalley* did not make the purchase as a trustee, then it might be declared that certain sums received by him ought to have been applied towards payment of the 20,000*l.*, and interest, and for account and payment; and that the amount due for principal and interest in respect of the mortgage debt might be ascertained and raised.

The above is a brief outline of the leading facts of the case. The Defendant *G. H. Whalley* set up the case that the Plaintiff and *Nicholson* had refused to concur in the agreement of 1853, considering it hazardous, and that they had refused to co-operate with him in any way in making the mines profitable, and had held back until they found that after incurring great expense and risk he had succeeded in making the concern an advantageous one. The Plaintiff contended that he had not sufficient information as to the facts of the case till he obtained it in the course of the proceedings for compromising *Nicholson v. Whalley*. There was a conflict of evidence on these points, particularly as to the amount of information actually possessed by the Plaintiff at the time when the transaction of 1853 took place, and at the time when his former bill was dismissed, but there did not appear to be any reason to attribute any fraud or wilful concealment to *G. H. Whalley*.

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The cause came on to be heard before Vice-Chancellor *Wood*, who was of opinion that the Plaintiff had lain by in such a manner as to debar himself from all right to claim to treat the transaction of 1853 as made for the benefit of the cestuis que trust of the 20,000*l.* His Honor considered that in *July*, 1853, the Plaintiff was in a position to have obtained all requisite information; and that after having, so long ago as 1854, abandoned his former suit, in which he asserted the same right as in the present one, and having waited for the result of another suit founded upon a different view of the same facts, and allowed the Defendant so long to carry on a concern of an extremely hazardous nature, he was not at liberty now to revive his former claim. As regarded the other alternative of the prayer, his Honor considered the bill unnecessary, since a decree had been made in *Nicholson v. Whalley*, under which the Plaintiff *C. J. Whalley* might obtain all he was entitled to under the agreement of 1857. His Honor accordingly dismissed the bill with costs as against all parties. The Plaintiff appealed.

Mr. *Rolt* and Mr. *Druce*, for the Plaintiff, in support of the appeal.

We say, first, that *G. H. Whalley*, having purchased in the character of administrator, was a trustee for us, even if he bought with his own money. But, secondly, we say that all the consideration which he paid to the *Youdes* was derived from the estate, to which we are beneficially entitled. We say, then, that any defence grounded on lachness or acquiescence is excluded, firstly, because this was not a mere constructive trust; and, secondly, because *G. H. Whalley* expended no money of his own, but only money in which we are interested, and which we have a right to follow. But we say further

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further, that even if such a defence is admissible it is not established.

Now, as to the first point, the agreement of 1847 shows that the receivership was annexed to the office of administrator. The being administrator introduced *G. H. Whalley* to the receivership, and the receivership placed him in a position to obtain the agreement of 1853, which he must be taken to have entered into in the character of administrator. It has been urged on his behalf that he did not continue a trustee for us till 1853, but the decree in *Nicholson v. Whalley* is decisive in our favor on that point. *Fosbrooke v. Balguy* (*a*) applies. The purchase is one for the benefit of the estate, and indeed the subsequent letters of *G. H. Whalley* admit a continuing trust.

Then as to the second point, *G. H. Whalley* admits that 5,000*l.* was paid to him under the agreement of 1853, and that 2,700*l.* has since been raised. He has thus been paid out of the estate the whole of his advances, and cannot set up the case that the purchase was made with his own money.

Then upon the question whether our right is barred. In order to bar our right there must be lapse of time; full information must have been given to us, and there must have been acquiescence after receiving such information, and an expenditure by the Defendant on the faith of such acquiescence. Here the lapse of time alone is clearly insufficient; *Hart v. Clarke* (*b*). The obligation on *G. H. Whalley* to give us full information is shown by *Clements v. Hall* (*c*), and he never gave us any but

(*a*) 1 *M. & K.* 226.

(*b*) 6 *De G., M. & G.* 232.

(*c*) 2 *De G. & J.* 173, 188.

but what we extracted by suit. Acquiescence on our part there has been none, nor has there been a lying by while the Defendant was incurring risk and expenditure. The colliery from 1853 has been let, so that there has been no risk, the agreement for that lease having been nearly settled when the purchase was made, and moreover the property does not entirely consist of mines as it did in the reported cases relied on in the Court below. The principles of *Norway v. Rowe* (a) and *Prendergast v. Turton* (b) have never been applied to a case of direct trust like this; *Clegg v. Fishwick* (c); *Hart v. Clarke* (d); *Clegg v. Edmondson* (e); *Clements v. Hall* (f).

Mr. Daniel and *Mr. G. Osborne Morgan* for the Defendant.

We say that this is a case of unfair lying by—a case where the Plaintiff, having full means of knowledge, determined not to put forward his claim until events occurred which made it advantageous to do so. As to the points made by the Plaintiff, we say that there is no case of direct trust. The Defendant was, no doubt, a trustee for the purpose of raising the 20,000*l.* The agreement of the 20th of September, 1847, was the root of the title, and this agreement was based on the contingency of the concurrence of all parties in a lease of the mines being obtained. The direct trust could only apply then to the interest to be created by the joint action of the parties, and could only arise in the event of the agreement being carried out. By the agreement the Defendant took upon himself liabilities. The result of the

agreement

(a) 19 *Ves.* 144.

(d) 6 *De G., M. & G.* 232;

(b) 1 *Y. & C. C. C.* 98; *S. C.* 6 *H. Lords Ca.* 633.

on appeal, 13 *L. J., N. S., Ch.* 268. (e) 3 *Jur. N. S.* 299, *L. J.* 173.

(c) 1 *M'N. & G.* 294.

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v.

*W<sup>HALLEY</sup>.*

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agreement was speculative, and the Plaintiff deliberately refused to incur liability. In *March*, 1849, the Defendant applied to Plaintiff to know what he was to do about the property, and received by letter the answer that he must act on his own risk. After that letter there was no obligation on the Defendant to see that the Plaintiff received full information. The purchase in 1853 was a very hazardous one. Apart from the mines it was a losing bargain, and there was not at that time any binding agreement for a lease of the mines. If the *British Iron Company* had not taken them the contract of 1853 would have been a most disadvantageous one.

Mr. *Rolt* in reply.

If a joint owner standing in no fiduciary relation to the other part owners purchases, that is a case of merely constructive trust, and the person claiming the benefit of it must come speedily even if his knowledge be imperfect. But the case is different where the purchaser originally stood in a fiduciary relation to the other parties interested. In that case a duty is imposed upon him. There are two classes of cases of this description. First, where the trustee purchases with his own money; secondly, where he purchases through the medium of the trust estate. Even in the first of these classes a clear case of rejection by the cestui que trust is necessary in order that his right may be taken away, à fortiori where the purchase is made by means of the trust property. There the newly-acquired property must go with the original property, and nothing will bar the right to the one which would not bar the right to the other. Here the Defendant was an actual trustee at the time of the purchase, and it lies on him to show that, after he had given us full information, we abandoned our claims to the property. It is said that the agreement of 1847 created a new right, but the Defendant entered into that agreement

agreement as administrator, and what he took under it he therefore expressly took as administrator. The filing of a bill in *June*, 1853, was a prompt assertion of the Plaintiff's title. The only point against him is his abandonment of that suit, but the Plaintiff continued his claim in the suit of *Nicholson v. Whalley*. That suit was compromised, and it was during the proceedings for compromise that the present Plaintiff first learnt the true state of the case, of which the Defendant ought to have informed him before, and after obtaining such information, the Plaintiff, without any unreasonable delay, filed his present bill.

Judgment reserved.

*The LORD JUSTICE KNIGHT BRUCE.*

The very full manner in which the Vice-Chancellor *Wood* entered into the particulars of this case when he disposed of it by dismissing the bill, the frame of the pleadings, and the ample manner in which it has been argued before us, render it unnecessary for me to enter much into detail on the present occasion.

Aug. 3.

The leading question in the cause is, whether the Plaintiff as he asserts, and the Defendant denies, is entitled to participate with him in the benefit of the agreement of the 5th of *February*, 1853, stated in the 26th paragraph of the amended bill.

That the Plaintiff, as one of the parties to the agreement of the 20th of *September*, 1847, stated in the 9th paragraph of the amended bill, is entitled to participate in the benefit of that agreement according to its terms and provisions the Defendant does not deny, nor does he object to any necessary or reasonable provision being made

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made by the Court for insuring the Plaintiff's right to obtain that benefit under the decree of the 28th of *April*, 1855, made in the suit of *Nicholson v. Whalley*, a decree mentioned in the pleadings before us. That decree, pronounced by the Lords Justices, was obtained in a suit instituted in *May*, 1853, by Mr. *Henry Nicholson*, and prosecuted after his death by his executors, who filed, in *January*, 1854, a supplemental bill in it. Mr. *Henry Nicholson*, who died, I believe, in *September*, 1853, was equally interested with the present Plaintiff under the agreement of *September*, 1847, and equally with him entitled to claim to participate in the benefit of the agreement of *February*, 1853, which, however, neither Mr. *Nicholson* nor his executors did. He and they waived and rejected all community of interest in the latter agreement, but insisted on their title under the former. The decree of *April*, 1855, was accordingly on that principle. It was made in the presence of the present Plaintiff, who, a Defendant to both bills, had put in answers to both; the supplemental bill having mentioned as a fact the agreement of *February*, 1853, which agreement, however, had been previously known to the present Plaintiff, for in *June*, 1853, he had himself filed a bill against the present Defendant for the purpose of obtaining against him a share of the benefit of the purchase made by the agreement of the 5th of *February*, 1853. That bill was amended in *June*, 1854, and as amended, made specific mention of the agreement of the 5th of *February*, 1853, giving its date, and was answered by the present Defendant, who in that cause substantially, as in the present, opposed or resisted the claim of the present Plaintiff Mr. *Charles Whalley* to participate in the benefit of the agreement of *February*, 1853. In that state of things, Mr. *Charles Whalley*, after having as I have said answered the two bills in *Nicholson v. Whalley*, allowed his bill, filed in *June*, 1853, and amended in 1854, to be in

in the early part of the year 1855, that is to say, in or before *February* of that year, dismissed for want of prosecution. He did so deliberately, as the orders of the 11th of *May*, 1854, and the 26th of *January*, 1855, show, and there was thus an end of that suit. Soon afterwards, I repeat, was made in his presence, the decree of *April*, 1855, proceeding on the agreement of *September*, 1847, and, on the rejection by the Plaintiffs in it, of that of *February*, 1853. The claims of the Plaintiffs in that cause were afterwards, in the year 1856, compromised between them and the present Defendant—a compromise which, effected with the knowledge of the present Plaintiff, but not including him, proceeded on the basis of the correctness and validity of the decree of *April*, 1855. After which, and not until some time in *October*, 1857, was instituted the present suit, for the same purpose substantially as the abandoned suit, dismissed, as I have said, in *February*, 1855, or the preceding month.

Now when the nature of the two agreements and of property, consisting to a great extent of mines, to which they related, and the correspondence of *March*, 1849, and *January*, 1853, and the arrangements of 1851, 1853 and 1856 with the new *British Iron Company* are considered, I think that the present Plaintiff must be deemed to have abandoned his title to claim participation in the benefit of the agreement of the 5th of *February*, 1853, and that it would be in a high degree inequitable after such a course of conduct on his part—conduct in which the evidence, in my opinion, shows to have been that of a person waiting to see how the mines would be likely to turn out before binding himself by an election to claim under the agreement of the 5th of *February*, 1853—inequitable, I say, to permit him effectually to assert such a claim in a suit commenced not before the Autumn of 1857, after what had in the years 1849, 1853 and

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and 1854, and subsequently, taken place. I think, therefore, that the dismissal of the bill in the present cause ought to stand, but that it should be without prejudice to his rights, under the decree of *April*, 1855, and on an undertaking by the present Defendant, which I understand him to be willing to give, that the present Plaintiff shall be permitted to assert and prosecute under that decree all his rights and claims consistent with that decree, on the footing of the agreement of *September*, 1847.

The LORD JUSTICE TURNER.

The concurrent opinion of my learned Brother and the Vice-Chancellor Sir *W. P. Wood* is most likely right, but I rather submit to than concur in the conclusion at which they have arrived. Their decision appears to me to extend considerably the principle on which *Norway v. Rowe* and *Prendergast v. Turton* proceeded, and I doubt whether it is desirable that it should be so extended.

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1860.

ORMES v. BEADEL.

THIS was an appeal from a decree of Vice-Chancellor *Stuart*, setting aside an agreement, on the ground that the Plaintiff had been induced to sign it under circumstances amounting to pressure or duress.

The facts of the case, and the arguments of counsel, with the authorities referred to, appear sufficiently from the report of the hearing below in Mr. *Giffard's* reports (*a*), and his Lordship's judgment.

Mr. *Bacon*, Mr. *W. D. Lewis* and Mr. *Druce* appeared for the Plaintiff.

Mr. *Malins* and Mr. *Osborne* for the Defendants.

Judgment reserved.

The LORD CHANCELLOR.

7 Nov.

On the ground that the Plaintiff acted under the agreement of the 11th of *December*, 1858, and that he did so voluntarily, seeking an advantage from it, and did so to the prejudice of the Defendant *Copland*, I am of opinion that the decree appealed against ought to be reversed, and that the bill must be dismissed.

I do not think that I am called upon to give any opinion as to whether the Plaintiff would have been entitled to a decree setting aside the agreement of the 11th of *December*, 1858, if he had duly repudiated it.

On

(*a*) Vol. 2, p. 166.

Nov. 3, 5, 7.

Before *The
Lord
Chancellor
Lord
CAMPBELL.*

Decree setting aside an agreement as having been signed by the Plaintiff under circumstances amounting to pressure or duress, reversed, the Court of Appeal (without pronouncing upon the question of duress) being of opinion that the Plaintiff, with a knowledge of all the facts, had voluntarily acted under the agreement, and had done so to the prejudice of the Defendant.

A substantial defence to the bill held available, though not expressly raised by the pleadings; the facts on which it rested being expressly alleged in the bill and answer and substantiated by the evidence.

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BEADEL.

On this part of the case I will only remark, that the non-fulfilment of the original agreement of the 13th of *August*, 1858, appears to me to have arisen chiefly from the Plaintiff not having had the pecuniary means which he represented that he had for carrying on the work; that *Chancellor* does not appear to have been at all connected with any scheme to incite the Plaintiff's workmen to their insurrectionary efforts to obtain payment of their wages; and that, if the Plaintiff was not in a situation to complete the building according to the contract, it might have been for the advantage of both parties to abandon the contract, the Plaintiff being paid according to measure and value for the work he had actually done. But, supposing the Plaintiff to have been entitled to repudiate the agreement of the 11th of *December*, 1858, the Plaintiff having taken the chance of *Gardner* making an award in his favor to the full amount of his demand, and having, when he was informed of the contents of the award, made no complaint of it to the opposite party till he filed his bill on the 4th of *January*, 1859, I am of opinion that he was not then in a condition to repudiate the agreement of the 11th of *December*, 1858. He voluntarily acted under this agreement by acquiescing in the appointment of *Gardner* as arbitrator (if he did not, as is sworn, actually select him for arbitrator) by appearing before *Gardner* as arbitrator on the 14th of *December* and then stating his case to him, by coming to *Gardner* on the 16th of *December* at *Coggeshall* and pressing him to go on with the arbitration, and by writing to him the letter of the 16th of *December*, 1858, addressed to *Gardner*, in these words:—

“ Sir,—When I signed the memoranda or agreement relating to Mr. A. *Copland's* house of *December* 11th, appointing you to value the work I have done, I intended it should include all the materials on the ground required

required for the building of the house, and I beg you will include them. Also Mr. *Chancellor* said he would be only too glad to have what joiner's work there is prepared for the house, should it be properly done—and why not include this also? I am, Sir, yours respectfully,

"John Edward Ormes."

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Gardner, accordingly, as desired by the Plaintiff, did on the following day make the valuation. If this valuation had reached the figure which the Plaintiff had demanded, or any sum approaching to it, there can be no doubt that the Plaintiff would very readily have admitted the validity of the agreement of the 11th of *December*, 1858, and of all done under it; and there can be no doubt that he might and would have enforced payment of this sum. When made acquainted with the actual valuation, he did not even then complain of it to *Copland* or *Chancellor*, or seek to complete the house under the original agreement.

On the 31st of *December*, *Chancellor* sent a letter to him asking him to come over to *Chelmsford* on the *Thursday* following, that all accounts might be settled, when he might have received the full balance due to him; but he took no notice of the letter, and downwards from the 14th of *December* he allowed *Chancellor* and *Copland*, without any remonstrance, to engage workmen and to procure materials and to finish the job according to the specifications. It was only on the 4th of *January*, 1859, when the bill was filed, that he thereby complained to the Defendants of the agreement of the 11th of *December*, 1858, or of anything done under it.

I do not think that there was ratification (as was contended) by the assignment to *Gooday*, or by the garnishee order which *Gooday* obtained; for these applied

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generally to the sums due under the original agreement of the 13th of *August*, 1858, not specifically to the sums due under *Gardner's* award, made under the agreement of the 11th of *December*, 1858. But under this last-mentioned agreement the Plaintiff had acted voluntarily and contentedly till the making of *Gardner's* award. This award disappointed him, although I see no reason to believe that it was unfair. By this acquiescence *Copland* would be materially prejudiced if the agreement of the 11th *December* were now to be set aside, for *Copland* would be liable to *Gardner* for the expenses of the award.

Under these circumstances the agreement of the 11th of *December*, 1858, cannot be treated as a nullity. There is nothing illegal in it, and if not originally binding, it might clearly have been ratified. This case is essentially different from the two cases cited by Mr. *Lewis*. In *Wood v. Downes* (*a*), the original deed was tainted by champerty, and the second deed "had been executed expressly at the instance of the Defendant." *Maitland v. Irving* (*b*) is still less in point, and I really must say that it seems to me to have no application to the point we are now considering. No case can be found to establish the doctrine, that if a voidable contract is voluntarily acted upon, with a knowledge of all the facts, in the hope that it may turn out to the advantage of a party who might have avoided it, he may still avoid it when, after abiding the event, it has turned out to his disadvantage.

Unless the award of *Gardner* was partial the Plaintiff is not aggrieved by the decree being reversed; for the decree, refusing any compensation for loss of the contract, substantially

(*a*) 18 *Ves.* 120.

(*b*) 15 *Simp.* 437.

substantially directs an account to be taken on the same principle as that on which the valuation of *Gardner* proceeded, both meaning that (the contract being abandoned) the Plaintiff should be paid for the work actually done according to "measure and value."

Great stress was laid by Mr. *Bacon* upon the words in the agreement of the 11th *December*, 1858, "such work as is approved of by you," as if this vested in *Chancellor* a power capriciously to select the work which *Gardner* was to value. But the meaning of these words clearly is, that *Gardner* was to value all the work which the Plaintiff had done under the original agreement, and was entitled to be paid for. I see nothing to impeach the impartiality of *Gardner* in making the valuation; and, giving faith to the agreement of the 11th of *December*, 1858, I do not see how this valuation could be impeached. *Gardner*, who was a wholly disinterested expert, had fully inspected the whole of the works with the assistance of the Plaintiff and the Plaintiff's foreman, and had heard what the Plaintiff had to say upon the subject, not only on the 14th but on the 16th day of *December*; and on this latter day, with a full knowledge of the manner in which *Gardner* had examined the work and in which *Gardner* had comported himself on the 14th, the Plaintiff pressed him to proceed and to finish the valuation, extending his power to an additional subject not expressly included in the first submission.

Objection is made that ratification is not expressly set up by the Defendant's substantial defence, but the facts on which it rests are expressly alleged in the bill and answer and are clearly substantiated by the evidence. I am therefore obliged, though most reluctantly, to differ from the view taken of this case by the Vice-Chancellor, and to adjudge that the bill be dismissed with costs.

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ORMES
v.
BEADEL.

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## BORTON v. DUNBAR.

*Nov. 8, 9.*

Before The  
*Lord*  
*Chancellor*  
*Lord*  
*CAMPBELL.*

An officer in the army by his will, made on his way to *England* on sick leave, after bequeathing two small legacies to a non-commissioned officer and private of his regiment, and directing his portmanteau, carpet bag and sea chest to be sent to his father's residence in *England*, begged that, after those sums and other necessary expenses had been provided for, the remainder of his money and effects might be expended in purchasing a suitable present for his godson,

*H. F. D.* (then a child of a year old), son of the paymaster of the regiment:—*Held*, that the residue of the testator's personal estate, consisting of reversionary interests in certain sums of stock, did not pass to his godson.

THIS was an appeal from part of a decree made by Vice-Chancellor *Stuart*, by which it was declared that, according to the true construction of the will of the testator in the cause, the reversionary interest in certain sums of stock to which the testator was entitled at the time of his death did not pass by the disposition in his will, which was in dispute. The will was dated the 15th of August, 1852, and was made by Captain *Henry John Borton*, of the 74th Highlanders, while on his way to *England* on sick leave from the *Cape of Good Hope*, where his regiment was stationed. It was as follows:—

“Cape Town, 15th August, 1852.

“I *John Henry Borton*, captain in H. M. 74th Highlanders, being of sound mind, do will and bequeath unto private *Henry Thornhill*, 74th Regiment, who has been my faithful servant ever since I joined the corps, the sum of 10*l.* for his immediate use, my father having promised to provide for him. And to Sergeant *James Dunn*, of the 74th Regiment, the sum of 10*l.* I further wish that my portmanteau, carpet-bag and sea-chest be sent to my father's residence, and disposed of as he thinks proper. After these sums and other necessary expenses have been paid, as well as those sums mentioned in my letter dictated this day to Sergeant *Dunn*, I beg that the remainder

remainder of my money and effects may be expended in purchasing a suitable present for my godson *Henry Fitzgerald Dunbar*, son of the Paymaster of the 74th Highlanders."

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By the letter referred to in the will, which was addressed to his family in *England*, the testator, after referring in grateful terms to the kind attendance upon him of a medical officer of the *East India Company*, proceeded as follows:—

"I feel certain that my father will see the wish now going to be expressed carried out, viz. that a handsome present should be provided for him out of my effects. Now with respect to pecuniary affairs and effects: in consequence of being ordered off to *England* by a medical board, I sold off everything with the exception of a few articles which, according to my father's letters, I know he would like me to send home, and therefore I have left instructions that my portmanteau, carpet-bag and sea-chest should be forwarded in case of my death to my father *J. H. Borton, esq., Bury St. Edmunds, Suffolk, England.*"

The testator died at *Cape Town* on the 16th of *August, 1852.*

Captain *Dunbar*, the paymaster of the 74th, took possession of the estate and effects of which the testator died possessed at the *Cape*, and after sending the portmanteau, carpet-bag and sea-chest of the testator to *England*, and paying his debts, funeral and testamentary expenses at the *Cape*, and the two legacies of 10*l.* each given by the will, he retained the balance amounting to 11*l. 7s. 2d.* for the purpose, as was alleged in the bill, of providing a suitable present for the testator's godson, then an infant of a year old. It was alleged on behalf of

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BORTON
v.
DUNBAR.

of *H. F. Dunbar*, the sole Defendant, however, that the balance had been expended in erecting a tomb to the memory of the testator.

The testator at the time of his death was entitled, under the will of his grandmother, to a vested interest in reversion in one-third part of the sum of *2,397l. 3s. 6d.* Bank £3 per Cent. Annuities expectant on the death of his mother, but subject to her power of appointment amongst her children. He was then also entitled to a reversionary interest expectant on the death of his father in one-third part of a sum of *11,344l. 9s. 9d.* Bank £3 per Cent. Annuities under articles of settlement dated 22nd of *June*, 1822, and made on the marriage of his parents. This interest was also said to be subject to a general power of appointment by the mother amongst the children of the marriage. Mrs. *Borton*, the testator's mother, died in 1859, without having exercised her power of appointment over the sums of stock above mentioned, and leaving children her surviving. There being no executor named in the will, the Plaintiff, the father and sole next of kin of the testator, took out letters of administration cum testamento annexo of his estate and effects, and filed the bill in this suit, stating his belief that at the time of his decease the testator was not aware that he was entitled contingently or otherwise to any other property whatsoever than that which he had in his possession at the *Cape* and a small balance at his agent's in *England*, and praying a declaration of the right of the Plaintiff or Defendant to the residuary personal estate of the testator, and that such directions might be given and accounts taken as the Court should think fit.

There was conflicting evidence as to the knowledge of the

the testator at the time of his death of his interest in the two sums of stock in question.

The Vice-Chancellor, by his decree, made the declaration appealed from, and directed certain accounts to be taken.

The case is reported below in the second volume of Mr. Giffard's *Reports* (*a*).

Mr. Bacon and Mr. Leach, for H. F. Dunbar the Defendant, in support of the appeal.

The words "the remainder of my money and effects" are clearly sufficient to embrace the testator's residuary personality; *Stocks v. Barré* (*b*). The evidence shows that the testator must have been aware of his interest in the sums of stock in question. But the extent of the testator's knowledge of the state of his property at the date of his will is immaterial. However doubtful it may seem, looking at the circumstance of the will having been made so shortly before the testator's decease, and at a time when he believed himself at the point of death, whether he intended to confer so large a benefit upon his godchild, and whether, in fact, he was aware that he was entitled to any interest in these two sums of stock; the question to consider is, whether he might not have acquired other property; and if so, whether the Court can hold that he intended to die intestate as to his residuary personal estate whatever it might be. The question whether residue passes or not does not turn upon the particular property which the testator may be supposed to have had in his contemplation, but upon what the words which he has used will comprehend according to their ordinary import; *Bland v. Lamb*.

(*a*) *Puge* 221.

(*b*) *John.* 54.

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v. *Lamb* (a). The question therefore here is, not whether the words used are sufficient to comprise reversionary interests in stock, but whether those words are by the context of the will so qualified that an intention is manifested by the testator to exclude such interests. There is here no such context, but the words of the will manifest an apparent intention in the testator to give his godson all his personal estate, and the words used are sufficient to comprise the testator's interest in the sums of stock; *Kendall v. Kendall* (b); *Legge v. Asgill* (c); *Leighton v. Bailie* (d); *Boys v. Morgan* (e); *Crooke v. De Vandes* (f); *Rogers v. Thomas* (g). There is no reason why he should not have intended his residuary estate to pass. The language used is sufficient to embrace it. The testator speaks of his father with affection, but leaves the whole of his property to his godson. The Vice-Chancellor seems to have considered the reversionary interests in the stock to be too large in amount to have been intended to be applied for the purchase of a suitable present for an infant, but the Court cannot regard what might have been passing in the testator's mind. It can only look at the words of the will, which do not manifest an intention to provide for any one but the young *Dunbar*. The words of gift to him are sufficient to pass the residuary personal estate, and there being no other disposition of residue, it cannot be presumed that the testator meant to die intestate. There is no authority for saying that, because a purpose is pointed at, a gift of residue is to be held void or to be limited. The purpose pointed at here is the purchase of a suitable present for the testator's godchild, then an infant. A present means a gift, without defining what is to

- (a) 5 *Madd.* 412.
- (b) 4 *Russ.* 360.
- (c) *T. & R.* 265 (n).
- (d) 3 *Myl. & K.* 267.

- (e) 3 *Myl. & Cr.* 661.
- (f) 9 *Ves.* 197.
- (g) 2 *Keen.* 8.

to be given. For this purpose the whole might be suitably applied. An immediate and single application is not necessarily to be inferred; the gift is to be enjoyed by the infant, and to be applied for his benefit by the administrator as trustee, toties quoties, as the occasions of the legatee may require.

The Vice-Chancellor was of opinion that by "present" an immediate gift was intended. If so, the infant was incapable of giving a discharge, and it could not be safely paid until he attained twenty-one, or without the intervention of a chancery suit. A gift of a fund for a purpose pointed out is a gift of the fund absolutely; *Cope v. Wilmot* (a); *Barlow v. Grant* (b).

The Attorney-General (Sir Richard Bethell), Sir Fitzroy Kelly, Mr. Craig and Mr. Borton for the Respondent, the Plaintiff.

There is no gift in this will to the Defendant *Dunbar* except in the direction to purchase for him a suitable present; and when a gift has been obtained the bequest is satisfied. The present was to be immediate, and to be such as godfathers are in the habit of making, i. e. suitable with reference to the giver as well as to the recipient. The words "money and effects" do not occur in a clause of gift, but only in a direction to purchase. They were to be expended in a purchase, and that immediately. This is not a residuary bequest. There are here no words of gift nor anything from which an intention can be inferred of disposing of residue. The direction to expend cannot refer to the reversionary interests in the sums of stock now in question. How could such an interest have been expended? It was subject to Mrs. *Borton's* power

(a) *Amb.* 704; *Rop. on Legacies*, vol. 2, p. 1497 (4th edit.) (b) *1 Vern.* 255.

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DUNBAR.

power of appointment amongst her children, and nothing could be realised from it to be expended. The direction to expend was to be executed in a rational manner, having regard to the state of the property and the circumstances of the case. The words of the direction cannot be adhered to if more is given to the child than was necessary to purchase an immediate present suitable to a child of a year old. The direction to expend is the measure of the gift. The testator must be considered as adverting to the directions previously given in his will, and the clause in question must be read as referring not to the general residue of the testator's estate, but to the residue of the proceeds of the sale referred to in the will and in the letter dictated to Sergeant *Dunn*; *Omaney v. Butcher* (*a*); *Cook v. Oakley* (*b*); *Jenkins v. Hughes* (*c*).

Mr. *Leach* in reply.

In many of the cases in which residue has been held to pass under words similar to those used in this will there has been no gift except in the direction to expend or apply; *Legge v. Asgill* (*d*); *Leighton v. Bailie* (*e*). In *Cook v. Oakley* (*b*) the decision turned on the fact that the testator was not aware of his title to any other property except articles ejusdem generis with those enumerated in his will. There is in this case nothing tantamount to demonstration, which is necessary for the purpose of arriving at an intention contradictory to the legal meaning of the testator's words.

The LORD CHANCELLOR.

This case has been very ably argued on the part of the

(*a*) *T. & R.* 260.

(*d*) *T. & R.* 265, n.

(*b*) *1 P. W'ms.* 302.

(*e*) *3 Myl. & K.* 267.

(*c*) *6 Jur. N. S.* 1043.

the Appellant. In the course of my long experience I never heard an abler argument than that of Mr. *Bacon*, who brought forward every authority and every observation that could be of service to his client; and Mr. *Leach*, who followed him, has added observations well deserving the attention of the Court; but after paying the most respectful attention to those authorities and arguments, I am clearly of opinion that the declaration appealed against ought to be affirmed. I entirely concur in the principles urged in argument by the counsel for the Appellant; I bow to the authority of every case which they have cited; but still I am of opinion that the reversionary interests in question did not pass by the testator's will. There are words used in the will which seem to me clearly to indicate that he did not mean more should pass by his will to his godson than that which was then in his possession, and which might then have been immediately applied to the purchase of a suitable present for the godson.

If the will had contained after the words "I beg that the remainder of my money and effects" the words "which may now be so expended may be expended in the purchase of a suitable present for my godson *Henry Fitzgerald Dunbar*, son of the Paymaster of the 74th Highlanders," I cannot but think that it would then have been clear that the reversionary interest could not have passed, because they could not then have been sold. They were subject to a contingency, and it would then have been quite clear that it was the intention of the testator that immediately or within a reasonable time after his decease this present should be purchased and given to his godchild.

Those words are not to be found in the will, but I think that they are necessarily to be implied from the words

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words which are there. To imply them is not to make a will by interpolating them, but to read the words which the testator has used in the sense in which, as it seems to me, he must necessarily have meant them to be read and understood.

When he says "I beg that the remainder of my money and effects may be expended in purchasing a suitable present for my godson *Henry Fitzgerald Dunbar*," he clearly means that there should be one present, a suitable present, and that it should within a reasonable time be purchased and given to his godson. For that purpose the reversionary interests could not be applied. They could not even have been sold—they were not a marketable article, both being subject to a contingency, by the happening of which they might both have been defeated. Therefore it seems to me clear that this is not a bequest of all the testator's personal property, but a bequest of so much only of his property as could then be applied to the purchase of the present to be given to his godson.

Mr. *Bacon* went to the length of saying that there might be a present to be applied toties quoties; and it was afterwards argued that the present could not be made till the godson came of age, and further that it could not be made until there had been a suit, and that the estate could not be administered unless under the direction of the Court of Chancery. But the testator evidently did not contemplate a suit in chancery. His intention was that soon after his body was consigned to the dust, and his sea chest and his carpet bag and portmanteau had been sent to his father, what property there was left should be collected, and that after payment of his debts and funeral expenses this present should be purchased. That intention is, as it seems to me,

me, clearly expressed, and I think that if the Court were to hold that the reversionary interests in these two funds were to be applied for the benefit of the godson, it would defeat the expressed intention of the testator.

I do not think it at all necessary to comment upon the numerous cases which have been cited. Admitting them all to have been well decided, and yielding to their authority, they do not seem to me to conflict with the decision of the Vice-Chancellor, which ought, I think, to be affirmed.

Appeal dismissed with costs.

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BOSTON
v.
DUNBAR.

WOOLSTENCROFT v. WOOLSTENCROFT.

THIS was an appeal from a decree of Vice-Chancellor *Stuart*, declaring that a debt of 300*l.* due from the testator in the cause, and secured by mortgage of his real and leasehold estates, ought to be paid out of the testator's general personal estate.

The testator *Robert Woolstencroft*, by his will dated the 27th of June, 1855, directed that all his just debts, funeral and testamentary charges and expenses should be paid and discharged by his executors thereinafter named, as soon as convenient after his decease, out of his estate. The testator then gave all his personal estate, except leaseholds, to his wife absolutely, and he then devised, bequeathed and appointed all his real and leasehold estates to trustees upon trusts for the benefit of his

Nov. 9, 19.
Before The
Lord
Chancellor
LORD
CAMPBELL.

A direction in a will that all the testator's just debts, funeral and testamentary charges and expenses should be paid and discharged by his executors as soon as convenient after his decease out of his estate, followed by a gift of all the testator's real and leasehold

estates (which were subject to a mortgage) to trustees who, with his wife, were named also executors of his will:—*Held*, not to be such an expression of contrary intention as to bring the case within the saving of the act 17 & 18 Vict. c. 113, and held, consequently, that the cestuis que trust under the will of the real estate and leaseholds took them *cum onere*.

1860.


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 CROFT.

wife and children. He appointed the trustees and his wife executors and executrix of the will.

The suit was for the administration of the testator's estate, and the decision under appeal was made upon the hearing of a summons adjourned from Chambers.

The case is reported below in the second volume of Mr. *Giffard's Reports* (a).

Mr. *Malins* and Mr. *Cole* in support of the appeal.

The act 17 & 18 Vict. c. 113, expressly declares that a mortgaged estate to which a testator is entitled at his death is to bear the burden of the debt, unless the testator by will, deed or other document has signified any contrary or other intention. By "contrary intention" is meant an expressed intention inconsistent with the general provisions of the act, as, that the mortgage debt is to be paid out of the general personal estate; or, that the mortgaged property is not to be the primary fund for payment of the debt. The direction that the debts are to be paid by the executors means paid in the ordinary course of administration under the act. To justify a departure from that course the language must not admit of a doubt; *Ball v. Harris* (b); *Leigh v. Earl of War-rington* (c); *Robinson v. Lowater* (d); *Pembroke v. Friend* (e).

Mr. *Bacon* and Mr. *Eddis* for Respondents interested in the mortgaged estates.

The direction here is "shall be paid by my executors out of my estate," and it became the duty of the executors to pay the debts out of the property given to them, but only out of the property given to them as executors,

(a) *Page* 192,

(c) 1 *Bro. P. C.* (*Toml. ed.*) 51.

(b) 8 *Sim.* 485; 4 *Myl. & Cr.*
264.

(d) 17 *Beav.* 592.
(e) 1 *John. & Henm.* 132.

cutors, not out of that devised to others ; *Harris v. Watkins* (a). The real estate here is given not to the executors but to trustees ; *Henvell v. Whitaker* (b).

Mr. *Kay* for the trustees.

Mr. *Malins* in reply.

Prior to the act a charge of real estate with debts was not considered a sufficient ground for exonerating the general personal estate as the primary fund for payment of the debts ; and where, as here, the same persons were appointed trustees of the real estate and executors, that circumstance was considered to favor the non-exemption ; *Duke of Ancaster v. Mayer* (c). It is submitted that the same rule now applies as to exonerating the mortgaged estate as the primary fund under the statute for payment of the mortgage debt.

1860.
Woolsten-
croft
v.
Woolsten-
croft.

Judgment reserved.

The Lord Chancellor.

The only question in this case is, whether the testator, Nov. 19. by directing that all his debts should be paid by his executors, has sufficiently signified, under 17 & 18 Vict. c. 113, any contrary or other intention than that the devisees of certain land subject to a mortgage should not be entitled to have the mortgage discharged out of his personal estate.

By the statute the mortgaged land (instead of the personal estate) was made primarily liable to the payment of the mortgage debt with which the mortgaged land was charged. The legislature had become desirous that such mortgage debts should be paid by the heir or devisee who took the land ; whereas formerly, the policy of the

(a) 1 *Kay*, 438. (b) 3 *Russ.* 343. (c) 1 *Bro. C. C.* 454.

1860.

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CROFT.

the law was that the land should be taken by the heir or devisee discharged of all incumbrances, and that the mortgages should be paid out of the personal estate, although the widow and younger children of the testator should be left destitute.

The mortgaged land being now made primarily liable, a liberty was still given to the testator to make an exception to the new rule, and still to throw the charge on the personal estate. But this was to be done by his clearly signifying this intention. In my opinion he can only signify this intention by express words, or by the language employed clearly indicating that he meant the devisee or heir to take the land free of the charge and to throw the charge upon his personal estate. I will not say that the words here relied upon are mere words of style, like the pious phrases with which wills usually began, but they do not seem to me to show that the testator had in his mind the option given him of making the debt fall upon the mortgaged land or on the personal estate. He does not say that the payment is to be out of his personal estate, but out of his estate generally; and the real estate being charged with all the debts and the payment having to be made by the executors, the executors would have the means of effecting a sale of part of the real estate if necessary for that purpose.

I think the same rule should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money, as was before observed with respect to exempting the personal estate, the mortgaged land being now primarily liable as the personal estate had been liable previously. Expressed intention was formerly allowed to prevail over the usual rule of law, but the intention to transfer the liability from the personal estate to the heir or devisee of the mortgaged land

land was required to be clear and unequivocal. Express words were at one time considered necessary. After much wavering in the decisions of the courts the rule was laid down that there must be express words, or language which ought fairly to satisfy the judicial mind of the testator's intention to relieve the personal estate. This rule admitted implication, without requiring such strictly necessary implication as in the construction of wills is required to disinherit the heir-at-law.

My real opinion is, that in this case the testator had not in his mind the charge upon the mortgaged land, as to whether it should be paid by the devisees or out of the personal estate, when he directed that all his debts, funeral and testamentary expenses, should be paid by his executors out of his estate. He piously wished, for the good of his soul, that all his debts should be duly paid. The executors were to take charge of his worldly affairs when he was gone, and he desires his executors to pay all his debts.

The numerous cases which were decided on this subject before the recent statute will all be found exceedingly well collected and ably commented upon by Mr. *Jarman* in his Treatise on Wills (*a*). The only case besides the present which has occurred since the statute is *Pembroke v. Friend* (*b*). There, a direction in a will that "all just debts be paid as soon as may be," followed by a devise in fee of a freehold house, was held by the Vice-Chancellor *Page Wood* not to be such an expression of contrary intention as to bring the case within the saving clause of the statute. He said "something more than conjecture is necessary, and it is not competent to the Court to expound the proviso of the act in any other sense

(*a*) Ch. 46, sect. 3. (*b*) 1 John. & Hem. 132.

1860.
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 WOOLSTEN-  
 CROFT  
 v.  
 WOOLSTEN-  
 CROFT.

1860.

  
 WOOLSTEN-  
 CROFT  
 v.  
 WOOLSTEN-  
 CROFT.

sense than as requiring an expression of intention inconsistent with the general provisions of the act." In the present case the words are here added "by my executors out of my estate," and Vice-Chancellor *Page Wood* does say, "had he added the words 'by my executors' there would have been something on which to build the conclusion that he meant to express an intention that the general statutory rule should not apply." But *Woolsten-croft v. Woolstencroft* (*a*), being cited as an authority, the learned Judge seems to me merely to have sought to distinguish that case from *Pembroke v. Friend* (*b*), without intimating any approbation of the decision of Vice-Chancellor *Stuart*. Reverting to the rule of construction which Vice-Chancellor *Page Wood* lays down, can it be said that the direction here given is "an expression of intention inconsistent with the general provisions of the act?" Even if the executors in the first instance paid the mortgagee the sum due on the mortgage, it would not necessarily follow that the charge should not ultimately fall on the devisee, who by the statute was intended to bear it.

When I consider how constantly such general words as are relied on here are to be found in wills, without any intention of changing the burthen ultimately to be borne by those who participate in the bounty of a testator, I am afraid that if they were held sufficient to bar the operation of the statute, the statute would be almost altogether inoperative. Upon the whole I must pronounce that I am not judicially satisfied of the testator's intention by any language he has used in his will, to exempt his devisees of the land in question from the charge of the mortgage debt, and I adjudge that so much of the decretal order of the 1st of *May*, 1860, as is appealed from, touching the discharge of the mortgage debt, be reversed.

(*a*) 2 *Giff.* 192.

(*b*) 1 *John. & Hem.* 132.

1860.

## LAYTON v. MORTIMORE.

**M**R. J. H. TAYLOR, for the solicitor to the Suitors' Fund, moved on a report of the governor of *Hertford* Gaol, under the 23 & 24 Vict. c. 149, s. 5, that the Defendant *Mortimore* was unable, by reason of poverty, to employ a solicitor, for an order pursuant to 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, r. 7, assigning to the Defendant *James Mortimore* (a prisoner in *Hertford* Gaol under an attachment for not putting in his answer in the suit), a solicitor and counsel for putting in his answer and defending him in formâ pauperis.

He stated that, according to the practice under the act 11 Geo. 4 & 1 Will. 4, c. 36, an order in the terms now asked was of course, and was not mentioned to the Court.

In the present case, however, the first under the new act, the Registrar, by reason of the words "if he shall see fit" occurring in 23 & 24 Vict. c. 149, s. 5, felt a difficulty about drawing up the order without the matter having been previously mentioned to the Court. The object, therefore, of the present application was, first, to obtain a direction that the order be drawn up; and, secondly, to ascertain whether the practice was to be in all future cases to treat the order as of course, or in every case to mention the matter specially to the Court.

*The LORD CHANCELLOR.*

This being the first case which has occurred under the recent act, it was fit and proper that it should be mentioned to the Court, and the order made by the Court;

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B B

D.F.J. but

Nov. 5, 6.  
Before *The  
Lord  
Chancellor*  
*Lord  
CAMPBELL.*  
An order  
under the 23  
& 24 Vict.  
c. 149, s. 5,  
assigning  
to a pauper  
defendant in  
custody under  
an attachment  
for want of  
answer a soli-  
citor and  
counsel is of  
course.

1860.  
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 LATTON
 v.
 MORTIMORE.

but in all similar cases which may hereafter occur, I think a similar order may be made without the matter having been previously brought specially to the attention of the Court.

Nov. 6.

Mr. *J. H. Taylor* applied for the discharge of the Defendant, who had now put in his answer; the costs to be paid out of the Suitors' Fee Fund.

The Lord Chancellor made the order.



In the Matter of THE WARWICK AND WORCESTER RAILWAY COMPANY, and of the JOINT STOCK COMPANIES WINDING-UP ACTS, 1848 and 1849.

Claim of WILLIAM BROMLEY PRICHARD.

Ex parte MARSHALL TURNER.

Nov. 8.

Before *The
Lords Jus-
tices.*

The proceeds of a call made under the Winding-up Acts to provide for the payment of a debt of the company may be attached in the hands of the Official Manager, under the Common Law Procedure Act, to answer a judgment against the creditor.

And in the same Matters.

Ex parte EDWIN SMITH.

THIS case came, by leave, before the Lords Justices, on two original motions, each raising the question whether a sum of money in the hands of the Official Manager of the above-mentioned company, being the balance, after payment thereout of certain demands, of the proceeds of a call made for payment of a debt due from the company to *William Bromley Prichard* for work done for them as their engineer, could be attached under the garnishee sections of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125) (a), by a judgment creditor of Mr. *Prichard*.

The

(a) The garnishee sections of Judge, upon the *ex parte* application of such judgment creditor, the Act are as follows:— either before or after such oral

" 61. It shall be lawful for a

The object of the former of the above applications, that of Mr. *Marshall Turner*, was that the Official Manager might be ordered forthwith to pay to the applicant the amount of the two judgment debts recovered by him against Mr. *Prichard* in the Court of

Common

1860.

Re
WARWICK,
&c., RAIL. CO.
PRICHARD'S
CLAIM.

Ex parte
TURNER.

Ex parte
SMITH.

examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Judge or a Master of the Court, as such Judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

" 62. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the Judge shall direct, shall bind such debts in his hands.

" 63. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or

claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the Judge may order execution to issue, and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt.

" 64. If the garnishee disputes his liability, the Judge, instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor, if less than the judgment debt, and for costs of suit; and the proceedings upon such suit shall be the same, as nearly as may be, as upon a writ of revivor issued under 'The Common Law Procedure Act, 1852.'

" 65. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceeding may be set aside or the judgment reversed."

1860.

Re
W^AR^EW^IC^K,
&c., RAIL. CO.

PRICHARD'S
CLAIM.

Ex parte
TURNER.
Ex parte
SMITH.

Common Pleas, on the 28th and 30th of *July*, 1856, amounting together to the sum of 813*l.* 16*s.* 6*d.*, pursuant to orders made by Mr. Justice *Willes* on the 2nd of *August*, 1860.

The other application was that of Mr. *Edwin Smith*, and it asked for an order directing the Official Manager to pay to the applicant 100*l.*, with interest from the 9th of *March*, 1854, to the 8th of *November*, 1860, amounting to 26*l.* 13*s.* 6*d.*, due under a charge created by Mr. *Prichard* in favor of *Edwin Smith*, by writing under his hand dated the 9th of *March*, 1854, after deducting the sum of 20*l.* due from him (*Smith*) in respect of a call made on him for the liquidation of Mr. *Prichard's* claim on behalf of the company.

It appeared that Mr. *Smith* had obtained a judgment against Mr. *Prichard* for 446*l.* on the 30th *January*, 1854, and that by the agreement of the 9th *March*, 1854, referred to in his notice of motion, he had agreed to accept 400*l.* and interest at 4*l.* per cent. from the date thereof, in satisfaction of the judgment, the amount so agreed upon being thereby further secured in portions of 100*l.* each and interest on certain securities therein mentioned; one of such portions of 100*l.* and interest being thus secured by a charge on the debt claimed by Mr. *Prichard* against the *Warwick and Worcester Railway Company*.

The two orders of Mr. Justice *Willes* referred to in the notice of motion on behalf of Mr. *Turner*, were orders made in Chambers to attach the monies due to Mr. *Prichard* in the hands of the company; Mr. *Turner* undertaking not to act upon the orders in any way, except under the order of the Court of Chancery.

A similar

A similar order was stated to have been made in favor of Mr. *Smith* in respect of 300*l.* and interest still remaining unpaid of his judgment debt of 1854, but it did not appear that this had been drawn up.

It was stated that the sum remaining in the hands of the Official Manager was not sufficient to pay the debts claimed in the two notices of motion in full.

Mr. Bagshawe and Mr. Elderton for Mr. Turner.

The garnishee orders of Mr. Justice *Willes* have given priority, as respects this fund, to Mr. *Marshall Turner*, over the prior judgment creditors of Mr. *Prichard*.

Mr. Crucknall, for Mr. Edwin Smith.

There can be no garnishee, unless in the character of debtor. The Official Manager is a mere ministerial officer of the Court of Chancery, and cannot be considered as a debtor of Mr. *Prichard*. The thing to be attached under the garnishee sections of the Common Law Procedure Act, 1854, must be a debt due from the garnishee, not, as in this case, a mere claim. Thus it has been held, that money directed to be paid by a Master's allocatur, or money awarded under a rule of Court, cannot be attached; *Coppell v. Smith* (a). So a dividend payable by the assignees of a bankrupt to a creditor of the bankrupt, who has proved the debt in the Court of Bankruptcy, cannot be attached under the Common Law Procedure Act, 1854, sect. 63, by a judgment creditor of the person to whom such dividend is payable; *Boyse v. Simpson* (b); *Gilmore v. Simpson* (c). As to the right of Mr. *Smith* to be paid the amount claimed by his notice of motion in respect of the charge created by the agreement of the 9th *March*, 1854, there is no dispute.

Mr. Baggallay

(a) 4 *Term Rep.* 312.

(c) *Ibid. App. xxxviii.*

(b) 8 *Ir. Com. Law Rep.* 523.

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Re
WARWICK,
&c., RAIL. CO.

PRICHARD'S
CLAIM.

Ex parte
TURNER.
Ex parte
SMITH.

1860.

Mr. Baggallay for the Official Manager.

Re
W^ARWICK,
&c., RAIL. CO.

P^ATRICHARD'S
CLAIM.
Ex parte
TURNER.
Ex parte
SMITH.

The LORD JUSTICE KNIGHT BRUCE.

According to the true construction of the act of parliament, and to common sense also, the orders appear to me effectually to give a title to Mr. *Turner*.

The LORD JUSTICE TURNER.

I was at first inclined to think, that the order asked for would amount to an attachment of an equitable debt; but here the attachment is against the company, upon a debt due from the company; and the Official Manager has money in his hands wherewith to pay the debt, independently of any question as to how the fund arises.

The order made was "one order on both motions; let Mr. *Smith* be paid his demand of 126*l.* 13*s.* 6*d.*, and 5*l.* for his costs, less the 20*l.* due from him for the call; pay the Official Manager 25*l.* for his costs; and pay the residue of the fund to Mr. *Turner*; and let all the attachments be discharged."



1860.

JENNER *v.* JENNER.Nov. 5, 6, 7,
17.

THIS was an appeal from the decree of the Vice-Chancellor *Stuart* dismissing with costs the Plaintiff's bill, praying the rectification of a re-settlement of family estates, so far as it gave him an estate for life only, instead of an estate tail.

Before The
Lord
Chancellor
Lord
CAMPBELL.

A re-settlement, executed by a tenant for life and his son, who was tenant in tail in remainder, had been prepared by the father's solicitor, and the son had not had the advantage of independent professional advice, but it appeared that the son was well acquainted with and had been advised respecting the provisions of the deeds of re-settlement before they were executed by him, and that the transaction was a reasonable one and for the good of the family, and not upon the whole for the personal benefit of the father. Held, not a case for setting aside or altering the deed.

The following is a summary of the facts of the case, which are fully set forth in the report of the hearing below in Mr. *Giffard's Reports* (*a*).

By indentures of settlement dated in August, 1824, and made on the occasion of the marriage of *Robert Francis Jenner* and *Elizabeth Lascelles Jenner*, the *Wenvoe* estate in *Glamorganshire*, and other hereditaments and premises situate in *Glamorganshire* and *Yorkshire*, were limited to the use of *Robert Francis Lascelles* for life, with remainder to the use of his first and other sons in tail male, with remainders over. By the same indentures the settled estates were charged with a jointure of 1,000*l.* in favor of *Elizabeth Lascelles Jenner*, and power was reserved to *Robert Francis Jenner* to raise the jointure to 1,500*l.* a year, and to charge the settled estates with portions for the younger children of the marriage to an amount not exceeding 20,000*l.* Powers to the same extent of jointuring any future wife, and of raising portions for the children of a future marriage, were also reserved to *Robert Francis Jenner*, and he was further empowered to raise by charge upon the premises sums of money for his own purposes to the extent of 20,000*l.*

Robert

(*a*) Vol. 2, p. 232.

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Robert Francis Lascelles Jenner, the eldest child of the marriage, and first tenant in tail of the settled premises, was born on the 16th of *September*, 1826, and attained his majority on the 16th *September*, 1847.

By various deeds executed between the date of the above-mentioned indentures of settlement and the year 1850, *Robert Francis Jenner* exhausted his power of charging the settled estates with 20,000*L* for his own purposes.

In 1850, at which date there were thirteen children of the marriage living, *Robert Francis Jenner* became desirous of raising further sums of money, and being unable to do so upon the security only of his life interest in the settled estates, he applied to his son *Robert Francis Lascelles Jenner* to assist him by barring the entail for the purpose of letting in a charge upon the inheritance in priority to the estate tail of the son for a sum not exceeding 15,000*L*.

The son assented to this proposal, and with the father joined in executing two deeds dated respectively the 10th and 11th *January*, 1850. By the former of these, the entail of the settled estates created by the indentures of *August*, 1824, was barred, and by the second the same estates were, subject to certain specified charges, re-limited to *Robert Francis Jenner* for life, with remainder to his son *Robert Francis Lascelles Jenner* for life, with remainder after the decease of the survivor to the first and other sons of *Robert Francis Lascelles Jenner* successively in tail male, and, in default of such issue, to such person or persons as *Robert Francis Lascelles Jenner* should appoint, with divers remainders over in default of appointment, and an ultimate remainder to *Robert Francis Lascelles Jenner* in fee. By this indenture the power given to *Robert Francis Jenner* by the settlement of 1824,

1824, of increasing the jointure of his wife, *Frances Lascelles Jenner*, from 1,000*l.* to 1,500*l.* a year, and his power of raising portions for the children of a future wife, were extinguished, and the power of jointuring any after-taken wife was reduced from 1,500*l.* to 700*l.* a year. The indenture of re-settlement then reserved a power to *Robert Francis Jenner* and his son *Robert Francis Lascelles Jenner* to raise any sum not exceeding 15,000*l.* for their own use and benefit, and a power to the son *Robert Francis Lascelles Jenner*, in case he should survive his father, to charge the estates to the extent of 15,000*l.* The son was likewise empowered to charge the estates thereby settled with a jointure of 700*l.* a year, in favor of any wife he might marry, and with portions for younger children, to an amount not exceeding 10,000*l.*

Elizabeth Lascelles Jenner died in *September, 1850.*

The bill was filed by *R. F. L. Jenner* against his father *R. F. Jenner*, the trustees of the settlement of 1850, and the various persons claiming beneficially either by way of charge or otherwise under it, alleging that the re-settlement of 1850 was executed in performance of an arrangement previously agreed upon by the Plaintiff and his father, to the effect that the entail in the estates comprised in the indenture of 9th *August, 1824*, was to be opened; that a charge not exceeding 15,000*l.* was to be let in; and that, subject thereto, the estates were to continue or remain limited in the same manner, as respected the Plaintiff and his father, as settled by the indenture of *August, 1824*; and that the father should give up his power of increasing the jointure to his then wife; should limit his power of jointuring any future wife to 700*l.* a year, and should give up his power of charging portions for the children of a subsequent marriage

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riage respectively reserved to him in that settlement. The bill then stated that the two deeds of *January*, 1850, were, at the suggestion of the father, prepared by Mr. *Warter*, the father's solicitor; that no explanation was given to the Plaintiff, previously to his executing those deeds, by his father or by any other person, of the Plaintiff's true position with reference to the estates comprised in the settlement or the rental thereof or the incumbrances thereon; that the deeds were not, nor were any drafts or abstracts thereof, read over by the Plaintiff or by any person to him (except the parts relating to letting in the charge of 15,000*l.*, and restricting the powers of the Defendant *R. F. Jenner*), nor was the effect of the deeds explained to the Plaintiff; that the Plaintiff executed them under the full belief that their provisions were in all respects in conformity with the terms of the arrangement previously come to between him and his father; and that he did not become aware of the contrary till 1858. The bill prayed that the deeds of *January*, 1850, save so far as the same restored the life estate of the Defendant *R. F. Jenner* in the estates comprised therein, and enabled the Plaintiff and the Defendant *R. F. Jenner* to charge the estates with a sum not exceeding 15,000*l.*, and modified or restricted the powers of jointuring and charging with portions for younger children, respectively reserved to the Defendant *R. F. Jenner* by the settlement of *August*, 1824, was void, and not binding on the Plaintiff; and that the indenture of the 11th *January*, 1850, save so far as aforesaid, and save so far as the same was not inconsistent with the arrangement entered into between the Plaintiff and the Defendant *R. F. Jenner*, might be set aside or rectified or varied, or might be rectified in such other manner as the Court should think fit.

The Defendant *R. F. Jenner* and the trustees of the deed

deed of the 11th *January*, 1850, by their answers, denied the truth of these statements of the Plaintiff's bill and stated that it was expressly made part of the arrangement entered into by the Plaintiff and his father, and which was carried into effect by the deeds of *January*, 1850, that the estates comprised in the indentures of *August*, 1824, should be resettled by limiting to the Plaintiff the same estate which his father had taken under the prior settlement of *August*, 1824; and that the Plaintiff and his father instructed Mr. *Warter* to prepare such deeds as he might think best calculated to carry into effect the terms of the arrangement so agreed upon.

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From the evidence in the cause, it appeared that in 1850, 1851, 1852 and 1854, the Plaintiff had executed various deeds by which the whole sum of 15,000*l.* had been raised under the joint power given to the father and son, and that out of the last of the instalments so raised, amounting to 4,500*l.*, 1,000*l.* had been paid to the Plaintiff. In all these deeds, some of which were executed by the Plaintiff while at a distance from his father, the fact that the Plaintiff was only tenant for life in remainder of the premises comprised in the settlement of the 11th *January*, 1850, was recited.

The remainder of the evidence adduced on the part both of the Plaintiff and Defendant is fully described in his Lordship's judgment.

In the interval between the hearing below and the appeal, the Defendant *R. F. Jenner* died.

Mr. *Rolt* and Mr. *Nalder*, for the Plaintiff.

The sole object of the Plaintiff and his father in opening the entail of 1824, was to raise money. Without imputing fraud to any of the parties concerned or employed

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employed in the transaction in question, it certainly does not appear that the difference between an estate tail and estate for life was explained to either of the parties prior to the re-settlement of 1850. The Plaintiff's own evidence as to this is clear, and the onus of proving that the Plaintiff was aware of the effect of the deed of re-settlement is on the other side. The Plaintiff at the date of the re-settlement was only twenty-three years of age, and had been presented with a commission in the army purchased for him by his father, from whom he was also in the receipt of an allowance of 150*l.* per annum. He cannot, therefore, be regarded as then emancipated from parental influence, and where that is so the onus of proof lies on those who uphold the re-settlement; *Gordon v. Gordon* (*a*); *Torre v. Torre* (*b*); *Hoghton v. Hoghton* (*c*); *Baker v. Bradley* (*d*). Re-settlement does not import such a change in the limitation of property as was here made, nor does it appear that the Plaintiff understood the indenture of 1850 to be to that effect. The Plaintiff says that he never entered into any agreement to make such a change.

Mr. *Malins* and Mr. *G. Osborne Morgan*, for the Defendant, *R. F. Jenner*.

Having regard to all the circumstances of the case, and the situation of the family at the date of the transaction of 1850, the re-settlement proposed by Mr. *Warter* was a reasonable and proper one, and one which he might well suggest as advantageous for all parties. No fraud is imputed, nor was there any surprise upon the son, for the evidence shows that he was fully informed of the nature and particulars of the transaction, and was well aware of all that was going on.

The

(*a*) 3 *Swanst.* 400.

(*b*) 1 *Sm. & G.* 518.

(*c*) 15 *Beav.* 278.

(*d*) 7 *De G., M. & G.* 597.

The power to raise 15,000*l.* was given to the father and son, and considering what the father gave up in the re-settlement, he cannot be said to have exerted his influence as a parent for his own advantage. To a certain degree parental influence is inseparable from arrangements between father and son for the re-settlement of family estates; but its existence and operation are not sufficient to invalidate the transaction, if it be not exerted for the benefit of the person possessing it. If the re-settlement be not obtained by misrepresentation or suppression of the truth, if the father acquires no personal benefit, and if the settlement is a reasonable one, the Court will support it, even although the father did exert parental authority and influence over the son to procure the execution of it; *Hoghton v. Hoghton* (*a*); *Hartopp v. Hartopp* (*b*); *Dimsdale v. Dimsdale* (*c*). If the son alleges that he executed the deed under a mistake or misapprehension as to its effect, the onus of proof lies upon him, and his evidence as to that is more than counter-balanced by that in support of the Defendant's case. The evidence adduced to prove that the words taken down in writing were contrary to the concurrent intention of all the parties to the re-settlement must be strong irrefragable evidence; *Lady Shelburne v. Lord Inchiquin* (*d*); *Marquis of Townshend v. Stangroom* (*e*). And if the Plaintiff seeks to rectify the deed upon the ground of mistake, he must establish in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and must show exactly and precisely the form to which the deed ought to be brought; *Fowler v. Fowler* (*f*).

Mr. Craig

- (*a*) 15 *Beav.* 278.
- (*b*) 21 *Beav.* 259.
- (*c*) 3 *Drew.* 556.

- (*d*) 1 *B. C. C.* 338.
- (*e*) 6 *Ves.* 328.
- (*f*) 4 *De G. & J.* 250, 265.

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Mr. *Craig* and Mr. *H. F. Bristowe*, for the trustees, took the same course of argument on behalf of the unborn issue under the re-settlement. They cited *Pullen v. Ready* (a); *Cory v. Cory* (b); *Tendril v. Smith* (c); *Wycherley v. Wycherley* (d); *Stewart v. Stewart* (e); *Stockley v. Stockley* (f); *Brown v. Carter* (g).

Mr. *Rolt* in reply.

Admitting the rule to be, that family arrangements are to be supported, and that they are not to be varied, except upon the clearest evidence, it must still be shown that the instrument was executed with a knowledge of its purport by all the parties. Such knowledge is denied by the Plaintiff, who asserts that he executed the deed under the mistaken impression that it reserved to him his estate tail. The sole object of the re-settlement was to benefit the father, and upon him lies the onus of proving execution with notice of its contents by the son. It is submitted that the Defendant's evidence falls short of such proof. There has been here no consideration which would give the issue a right of suit; *Colyear v. Countess of Mulgrave* (h).

Judgment reserved.

The LORD CHANCELLOR.

Nov. 17.

I am of opinion that the decree appealed from ought to be affirmed. On account of the great importance of the case to the parties, I have very anxiously considered it both during the argument and subsequently; but I must say, that, from the time I fully understood the facts, I have

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|------------------------|----------------------------------|
| (a) 2 <i>Atk.</i> 587. | (e) 6 <i>Cl. & Fin.</i> 911. |
| (b) 1 <i>Ves.</i> 19. | (f) 1 <i>V. & B.</i> 30. |
| (c) 2 <i>Atk.</i> 85. | (g) 5 <i>Ves.</i> 862. |
| (d) 2 <i>Ed.</i> 175. | (h) 2 <i>Kee.</i> 81. |

I have entertained no doubt upon the law of the case; and I will now state the grounds on which my opinion is formed.

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In the first place, it is of essential importance to define the real controversy between the Plaintiff and his father. The Plaintiff does not seek to set aside the deed of the 11th *January*, 1850, but only to reform it. He complains only of the manner in which the estate was resettled, whereby he became only tenant for life, instead of remaining tenant in tail, as he had been before under the settlement of 1824. He admits that he was fully acquainted with, and that he fully assented to, the family estate being charged with the 15,000*l.*; that he was fully acquainted with, and that he fully assented to, all that was for the personal advantage of the father. His alleged grievance is, that he did not assent to, and that he was not informed of, that part of the deed, by which, the estate being resettled, he became tenant for life with a remainder to his sons in tail male; failing them with an absolute power of appointment of the fee to himself.

Although such settlement of the estate, by which it was likely to continue in the family, was probably very agreeable to the father, he derived no personal advantage from it. He lost the control of the estate, which he before enjoyed as protector of the settlement, and, by other clauses in the deed he had renounced his power of jointuring a second wife, and of providing for children of a second marriage. Therefore, from that part of the arrangement which is in controversy no advantage which the law recognizes was obtained by the father from the son; and, for the purposes of this suit, the question to be determined is the same as if the deed had been confined to this re-settlement of the estate. But if the onus still lies on those who support the deed to prove in

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in addition to the Plaintiff's solemn execution of the deed, that he was personally acquainted with the arrangement for resettling the estate giving him only an estate for life, and that he assented to this, still if this was a reasonable arrangement and for the good of the family, a Court of Equity will regard it very differently from an arrangement by which a father obtains a pecuniary advantage from a son on the son's coming of age.

Now that this re-settlement of the family estate was a reasonable arrangement and for the good of the family, and such as a Court of Equity ought to favor, can admit of no doubt. The only objection to which it is liable is, that, by the power of appointment, it gives the Plaintiff too great a control over the estate to the possible prejudice of his younger brothers and of his own daughters. But of this he cannot complain, as he seeks the power of absolutely and immediately alienating the estate, his father being now dead.

The practice of resettling entailed estates on the eldest son coming of age, which sustains ancient families, and still leaves a sufficiency of land in commerce, has been praised and fostered by English judges of the highest name. What could be more natural or laudable than that there should have been such a re-settlement of the *Wenvoe* estate upon the occasion in question? The entail of 1824 was necessarily to be barred for the purpose of raising the 15,000*l.*, and, even if there had been no object to prevent the father and son from burthening the estate by a further loan, was it not expedient to avoid a re-settlement with the same limitations as that of 1824, which would have rendered another disentailing deed necessary and would have required, in the language of Mr. *Rolt*, "another mountain of parchment?" The father gaining no pecuniary advantage by this

this re-settlement of the estate, and the settlement being reasonable, it would not be set aside by a Court of Equity on the ground of parental influence; and a Court of Equity will not view it with jealousy or require the evidence which, under other circumstances, might be necessary, of the son having a separate solicitor, and being advised by separate counsel.

I now proceed to show in this case that there is satisfactory evidence of the Plaintiff, before he executed the deed, having been made acquainted with the manner in which the estate was to be resettled, and of his assent to this arrangement. I need not refer to the Plaintiff's letter to his father of the 27th of *November*, 1849, saying, "I shall be very glad to be security for any money you may want to raise," or to any of the evidence respecting the 15,000*l.* to be raised. I begin with the letter dated the 2nd of *December*, 1849, to the Plaintiff's father from Mr. *Warter*, the family solicitor, who appears to be a gentleman of intelligence and skill in his profession, and who is admitted to have conducted himself in this transaction with the most perfect good faith:—

"Leamington House,
"My dear Sir, December 2nd, 1849.

"Without the subject being known in *Glamorganshire* you and your son can cut off the entail and resettle the estate on him, giving him by the re-settlement a present income, and an increased one in case of his contracting marriage during your life, and reserving a power enabling either, with the consent of the other, to raise money to a certain extent. This, I think, would be the most judicious course. The amount to be raised would depend upon the present clear income of the property, as it is important that the elder branch should always have the means of keeping up *Wenvoe*, and by this plan neither could raise money without from time to

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time applying to the other for his consent, and making him a party to the deed. It may be the more judicious course to confine this power to enabling you, your son joining you, to raise money. If anything of this sort appears to you desirable, it will be necessary to make your son fully acquainted with and master of the subject, and to be careful that nothing is done which, in after life, may give him the idea that he has not been properly considered.

"Yours, &c.

"R. F. Jenner, Esq.

"H. D. Warter."

"P.S.—When I have your ideas, I will, if you think fit, prepare a statement for you to submit to your son showing the income, the outgoings and what will be left in case of your death, allowing for the jointure secured to Mrs. Jenner."

Can it be said that this letter proposed a scheme, by which the estate was to be resettled making the Plaintiff tenant in tail; or that the objects it suggests could be accomplished by any re-settlement which was not to make the Plaintiff tenant for life with a remainder in tail to his sons? The father, as a sensible man, must have been aware of this, and he was earnestly desired to make his son master of the subject.

On the 9th of December, 1849, the father writes to *Warter*:—"This morning I gave my son your letter of the 2nd of December last to read, and we have had some conversation since on the subject of it. If you think it will be the best plan, and that I do not place him in any risk (which as far as I can see I do not) by resettling the estate on him again, he is quite willing to accept it. My son has no hesitation on his part about it." The father clearly accepted *Warter's* proposal, and it may fairly be inferred that it was then fully explained to the son.

But

But further, we have the positive evidence of two **witnesses** entirely trustworthy, that at a meeting on the 11th of *December*, 1849, between the father, the Plaintiff, *Warter* and *Gove*, *Warter's* conveyancing clerk (who is likewise admitted to have acted in the whole transaction with perfect good faith), the mode of resettling the estate which was adopted was then fully explained to the Plaintiff, and that the deeds were afterwards prepared according to what was then agreed upon. *Warter* swears, "at this meeting it was, on my suggestion and advice, agreed that the father should give up the power which he then possessed under the indenture of 1824 of increasing the jointure of his then wife from 1,000*l.* to 1,500*l.* per annum, and of charging the said estates with portions in favor of children by an after-taken wife; that the father should reduce his power of jointuring any after-taken wife from 1,500*l.* to 700*l.* per annum; that the estates should be resettled by limiting to the Plaintiff precisely the same estate which the father had taken under the original settlement of 1824, with remainder to the Plaintiff's sons in tail male, similar to that which, by the said last-mentioned settlement, was limited to the issue of the father; and that I, this deponent, should prepare such deed or deeds as, under the advice of counsel, I might consider best calculated to effect the said several objects: and the Plaintiff then appeared to be a person of shrewd understanding and with more than ordinary acquaintance with business, and to be fully acquainted with the nature, purport and effect of the arrangement so made between him and his father, and to be entirely satisfied with the same."

*Gove* swears "when I went in, the father was speaking to the Plaintiff as to what he had done with respect to the resettling of the estate, keeping it in the family. The Plaintiff acquiesced in that and expressed his approbation

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of what his father had done; and it was then arranged between them that the estate should be again resettled by the Plaintiff in the same way as his father had done. I believe it was arranged that the Plaintiff should take a life estate, as his father had done, after his father's death."

*Gove* proceeded to prepare the deeds as they were approved by counsel and were afterwards executed by the Plaintiff.

At this meeting there was not and there could not be any abstract or epitome of these deeds, but there was produced and examined an accurate analysis of the settlement of 1824, of the actual income of the estates and of all the charges upon them. It is admitted that *Gove*, in preparing the deeds, intended to act according to the instructions he had received on the 11th of *December*, and that he believed these were according to the arrangement to which the Plaintiff had agreed.

I now come to the 11th of *January*, 1850, the day on which the deeds were executed in *Carey Street, Lincoln's Inn*. *Warter* was not present on this occasion, having been called into the country on some urgent business; but *Gove* was present with an exact written epitome of the deeds showing most distinctly that the Plaintiff, under them, took only an estate for life; and thus *Gove* swears: "First of all, the deeds were explained to the Plaintiff and his father by me. I fully explained both to the Plaintiff and his father the deed of the 11th of *January*, 1850. I am quite certain I explained both to the Plaintiff and his father the nature of the estate which the Plaintiff took under the deed of the 11th of *January*, 1850, and I am quite certain that, to the best of my ability, I gave the Plaintiff a full and clear explanation of

of the uses declared by this deed, and that I went over and named to him all the operative parts of the deed; and to my comprehension they both seemed to comprehend my explanation. I have been in the habit of attending to the execution of deeds and wills and had much experience therein." Complaint is made that the whole deed was not read over to the Plaintiff; but, if *Gove* is to be believed, the Plaintiff was much more effectually put in the possession of the contents and operation of the deed than if many hours had been wasted in reading over every line of it. The father now, in this suit, gives upon oath an account of what passed on the 11th of *December* and the 11th of *January* to the same effect as that of *Warter* and *Gove*, and, with respect to his showing the letter of the 2nd of *December* to his son and explaining the subject to him, he is strongly corroborated by his own letter of the 9th of *December*, written the day after the facts which he alleges took place. But implicit credit cannot be given to his representations, as when this controversy first began, he said that he understood that his son, under the new settlement, was to continue tenant in tail. However, he cannot be relied upon as a witness for the Plaintiff, and all the probabilities of the case concur with the evidence of *Warter* and *Gove*.

What weight then can be given to the assertion of the Plaintiff himself, that he never was aware of any intention to resettle the estate in such a manner that he should only take a life estate, and that down to the time when he filed his bill he believed that he remained tenant in tail? This assertion of the Plaintiff is completely contradicted by what he himself subsequently said and did. In the beginning of 1855 he wished to borrow on the security of the family estate for his own use a sum of 700*l.*, and for this purpose he applied to *Warter*, the family

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family solicitor, who obtained the loan for him from the *London and Provincial Law Assurance Society*, upon the security of an annuity of 150*l.* and his reversionary interest in the family estates. On this occasion *Warter* informed the Plaintiff, that, "as his interest in these estates was only a life interest, it would be necessary for him to effect a policy of assurance on his life, and to transfer it to the society as part of the security for the proposed loan." The Plaintiff then instructed *Warter* to effect a policy for his life for the 700*l.*, and this policy was assigned by the Plaintiff, along with the Plaintiff's reversionary interest in the estates, as a security for the loan, by an indenture dated the 13th of *February*, 1855. A day or two before this *Warter* wrote a letter to the Plaintiff, which the Plaintiff received, asking him to come to execute this indenture, and containing the following expressions:—"The society must have an abstract of your reversionary interest in the *Wenvoe* estate, your annuity being only for your father's life, and you being therefore necessitated to make your life interest the security in the event of his death."

He is told that the policy must be effected, because he had only a life interest in the estate. On this footing he agrees to effect the policy, and he assigns it as a security, which would not have been required if he had continued to be tenant in tail. It is therefore vain for him to rely on ignorance of the contents of the deeds which he executed constituting the re-settlement of the estate, and nothing remains for him to urge except that he had not a separate solicitor, and that he had not sufficient time to deliberate before executing the deeds. But by such deeds he is bound, if, before he executed them, he was made acquainted with their contents, and he had agreed to the arrangement which they were to carry into effect.

Hoghton

Hoghton v. Hoghton (a) is the great authority relied upon by the counsel in support of the appeal; but that decision proceeded mainly on two grounds: first, that the father there obtained an advantage from the son from that part of the settlement which was impeached; and secondly, that the settlement was not reasonable nor for the benefit of the family. If authority is wanted for the doctrine on which my opinion rests, I refer to *Stewart v. Stewart* (b); *Baker v. Bradley* (c); *Dimsdale v. Dimsdale* (d), and *Hartopp v. Hartopp* (e), which seem to me be founded on morality, justice and expediency.

The Plaintiff's attempt now to impeach this settlement seems to me highly discreditable to him; and, for the peace and honor of families, I trust that it is not likely to be imitated.

Appeal dismissed with costs.

(a) 15 *Beav.* 278.

(d) 3 *Drew.* 556.

(b) 6 *Cl. & Fin.* 911.

(e) 21 *Beav.* 259.

(c) 7 *De Gex, M. & G.* 597.

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ELLIOTT v. INCE.

Ex parte TURNER.

*Nov. 16, 17.*Before *The
LORDS JUS-
TICES.*

A lunatic died in *June, 1853.* In *February, 1854,* an order in lunacy was made, by which it was declared that the costs incurred in prosecuting the commission had been incurred for the benefit of the lunatic, and the bill was directed to be taxed. The taxation was completed in *February,*

1855, and after this the solicitor who had been employed in prosecuting the commission delivered for the first time a signed bill of costs. In *October, 1860,* the solicitor presented a petition to have his costs raised out of property of which the lunatic, who left issue, had been tenant in tail. *Held,* that under the proviso contained in *23 & 24 Vict. c. 127, s. 29,* the application was too late.

Per the Lord Justice *Knight Bruce,* the time when the right to recover the costs accrued within the meaning of the proviso was the death of the lunatic.

Per the Lord Justice *Turner,* the right to recover, if it did not accrue at the death of the lunatic, accrued at the latest in *February, 1854,* when the costs were declared to have been properly incurred.

Whether, if the petition had been presented in time, the Petitioner could, under *23 & 24 Vict. c. 127, s. 9,* have had the relief sought, *quare.*

A copyhold property descended in fee upon a married woman, subject to a covenant entered into by a former owner upon his marriage to surrender it to certain uses, under which, had the surrender been made, the married woman would have been legal tenant in tail. *Held,* that she had no equity to a settlement out of property so circumstanced.

father, subject to a covenant contained in the marriage settlement of her father and mother, whereby it was covenanted that the property should be surrendered to the use (after certain life estates) of the heirs of the body of the mother by the father, so that if the surrender had been made, Mrs. *Cumming* would have been a legal tenant in tail. She was also tenant for life of other freehold and copyhold estates, with remainder to her two daughters in tail. Mr. *Turner* acted as solicitor to Mrs. *Ince* and Mrs. *Hooper* and their husbands in these proceedings.

By a deed of the 28th of *October*, 1852, security was expressed to be given to Mr. *Turner* for his costs by Mr. and Mrs. *Ince* and Mr. and Mrs. *Hooper*. The deed was however executed by Mr. *Ince* only. Much discussion took place as to whether its recitals did not cut down the general words used in the operative part, but the Court held that the security included Mr. *Ince's* interest in right of his wife in the first-mentioned copyhold.

In *June*, 1853, Mrs. *Cumming* died intestate, and letters of administration were granted to Mrs. *Ince*. The suit of *Elliott v. Ince* was shortly after instituted by a creditor for the administration of Mrs. *Cumming's* estate, and the common decree was made. Under the decree Mr. *Ince* claimed to prove for the amount of costs he had paid to Mr. *Turner*, and Mr. *Turner* claimed to prove for the residue of the costs. The Vice-Chancellor to whose Court the cause was attached having declined to admit the proof until an application in lunacy had been made, Mr. *Ince* and Mr. *Turner* presented a petition, upon which the Lords Justices, on the 10th *February*, 1854, (a) made an order declaring that the costs had been incurred

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incurred for the benefit of the lunatic, and directing them to be taxed. The taxation was completed in *February*, 1855, and the costs were found to amount to more than 2,000*l.*, and Mr. *Turner* subsequently delivered a signed bill of costs, not having previously done so.

A receiver of the copyhold estate which was subject to the covenant, and of other estates of Mrs. *Cumming*, had been appointed in a suit by a mortgagee. This suit was wound up, the receiver passed his final account, and a balance, partly arising from the sale of part of the mortgaged property and partly from the rents collected by the receiver, was carried over to the credit of the cause of *Elliott v. Ince*. 423*l. 7s. 1d.* of this balance was carried to an account showing that it was attributable to Mrs. *Ince's* moiety of the property.

The estate of Mrs. *Cumming* was found in the suit of *Elliott v. Ince* to be barely sufficient to pay the costs of the suit, so that Mr. *Turner* could not obtain anything in respect of his costs. In 1856 Mr. *Ince* became a bankrupt. In 1858 Mr. *Turner* filed his bill to have the entailed copyhold property made liable to his bill of costs, mainly on the ground that he undertook the business on the faith of representations that it should be so liable. In *February*, 1859, Vice-Chancellor *Stuart* made an order dismissing the bill as against Mr. and Mrs. *Hooper* and Mrs. *Ince*, and declaring that the Plaintiff had a lien for his bill of costs upon the interest of Mr. *Ince* in his wife's share of Mrs. *Cumming's* property. This decree was affirmed on appeal.

Mr. *Turner*, on the 31st of *October*, 1860, presented his petition, praying that the unpaid costs of the lunacy proceedings might be raised and paid out of the lunatic's estate, an inquiry as to their amount, and an inquiry how much

much of the fund in Court represented rents to which the Petitioner was entitled as the mortgagee of Mr. *Ince*. The object of this proceeding was to obtain payment out of those rents and out of the copyhold property, Mrs. *Cumming's* estate in which, by reason of the covenant to settle it, was in the view of a Court of Equity only an estate tail, so that it was not applicable as assets in the suit of *Elliott v. Ince*.

Mr. *W. M. James* and Mr. *Charles Hall* for the Petitioner.

The Petitioner is, we contend, entitled to an order such as he might have had in the lifetime of the lunatic. The proviso, as we submit, does not exclude him. The right to recover, as against the estate, did not accrue till the passing of the act. It did not accrue as against the clients themselves until a signed bill had been delivered. Moreover, the solicitor cannot charge the client as long as the business which he has undertaken remains incomplete; *Whitehead v. Lord* (*a*). The taxation of the bill of costs was not completed till *February, 1855*, and no right to recover against the estate could accrue till the certificate of the taxing master; *Pulling on Attorneys* (*b*). The case, therefore, is not affected by the proviso. If an application had been made in the lunatic's lifetime, the costs might have been raised out of her estate tail; *11 Geo. 4, c. 65, s. 28*; *Re Brand* (*c*); *15 & 16 Vict. c. 48, s. 1*; *16 & 17 Vict. c. 70, s. 116*. Power is given to the Court to sell the estate, as in bankruptcy an estate tail may be sold. Suppose an order for sale had been made in the lunatic's lifetime, and she had died before completion, the order would be effectual; *Re Humbleby*;

(*a*) *7 Exch. 69.*

(*c*) *1 M. & K. 150.*

(*b*) *Page 271.*

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*pleby* (a); there is no greater difficulty in the present case than in that. The statute 1 & 2 Vict. c. 90, s. 18, furnishes means for working out the order, which in fact operates as a judgment.

As regards the second branch of the case, that relating to the fund in Court, there is no answer to the Petitioner's claim. The greater part of the rents arose from property of which Mrs. *Ince* was legal tenant in tail, and as to the rest *Tidd v. Lister* (b) applies.

**Mr. Greene** and Mr. **Southgate** for Mr. and Mrs. **Hooper** and Mrs. **Ince**.

The retainer ceased at the death of Mrs. *Cumming* and the right to recover the costs accrued then within the meaning of the proviso; *Chitty on Contracts* (c). The order for taxation on the 10th of February, 1854, shows that the Petitioner considered that the business

was

(a) Not reported, but cited from a note furnished by Mr. *Wilde*, the Registrar in Lunacy, of which the following is a copy:—

In *Re Humbleby*, a lunatic, an order, dated 9th May, 1831, having been made in the lunatic's lifetime, under the act of parliament of the 1 Will. 4, c. 65, for sale of the lunatic's estate to pay his debts and the costs of the commission, and the lunatic having died before the order could be carried into effect, a bill was filed for administration of the lunatic's estate, and a decree made by the V. C. *Wigram*, of which the following is a note:—*Wood v. Lock*, 7th August, 1832. This Court doth declare that the freehold and leasehold estates and

other property in the order of the 9th day of *May*, 1831, mentioned were at the time of the testator's (the lunatic) death, and are, subject to and bound by the said order, and that the costs by the said order directed to be raised by sale thereof were a special charge or incumbrance and lien upon the premises. And it is ordered that the Master do inquire and state to the Court of what freehold and leasehold estates the said testator died seized or possessed. And it is ordered that the said freehold and leasehold estates by the said order directed to be sold be sold.

(b) 3 *De G., M. & G.* 857.

(c) *Page* 713 (5th edit.)

was then concluded, and that he had a right to recover the costs. But if the right to recover did not accrue at the death it must at the latest have accrued when the Petitioner's right was declared by the order of 1854. The non-delivery of a signed bill confers no right on a solicitor, so the fact that a signed bill was not delivered till a late period cannot take the case out of the proviso.

The delivery moreover of a bill to one cannot affect the right against another. The delivery was merely for the purpose of enabling the Petitioner to sue the husbands, and has no bearing on the right against the lunatic's estate. The proviso therefore disposes of the case.

But laying the proviso out of the case, we contend that the act does not apply to a case where the lunatic died before its passing. But suppose it does, how can the Court give the relief asked? The order, if made in the lunatic's lifetime, would be the same as in *Brandt's Case*, but how could such an order work after her death? how could the committee execute a disentailing assurance? he is *functus officio*. There could not have been an order on the co-heiresses in the lunatic's lifetime, so that any order to be effectual must be different from any that could have been made during Mrs. *Cumming's* life. Moreover an order on them, they being married women, to execute a disentailing assurance, would be against *Jordan v. Jones* (a). An estate tail we submit cannot be affected unless the order is made and carried into effect in the lifetime of the lunatic. [3 & 4 Will. 4, c. 74, ss. 40, 47, 56; *Sturgis v. Morse* (b); *Rooke v. Lord Kensington* (c), were also referred to.]

Then

(a) 2 *Phill.* 170

(c) 2 *K. & J.* 753.

(b) *Supra*, 223.

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Then we say that there is an equity to a settlement out of the funds in Court; *Sturgis v. Champneys* (*a*); *Freeman v. Fairlie* (*b*). The husband had no legal title to the copyholds, the wife never having been admitted. The funds being in Court an application to a Court of Equity is necessary, and the equity to a settlement attaches. The Petitioner, moreover, as mortgagee, has no claim to back rents.

Mr. James in reply.

There cannot be any equity to a settlement as to past rents which legally belonged to the husband. The husband's right was legal, the wife had a legal estate in fee; it was subject to be cut down to a legal estate tail by virtue of a contract enforceable in equity, but this does not make the wife's estate an equitable estate. The past rents are in medio, they have not got home, and the mortgagee may intercept them, the case being totally different from one in which the mortgagor has received them.

The LORD JUSTICE KNIGHT BRUCE.

With regard to the corpus of the copyhold property of which Mrs. *Cumming* was tenant in tail, or equitable tenant in tail, I think that, independently of the statute passed in the last session of parliament, no relief could have been given to the Petitioner. Independently of the clause as to the period of six years,—the limitation contained in the act,—I am not clear that the act assists Mr. *Turner*; but if, independently of the six years' clause, it would have assisted Mr. *Turner*, I think that he is excluded by that clause from any title to have the corpus applied in payment as is sought. The petition now before us was not presented before *October* of the present year. Mrs. *Cumming*, the lunatic,

lunatic, who questioned the alleged fact of her lunacy, and was the subject of the commission, died as long ago as the month of *June*, 1853; and I think that it is from that period that the six years must be counted. It has been plausibly and ably argued that the six years could only count from the completion of the taxation which ascertained the amount and the order for which gave the right. That is not my opinion. I think that according to the true construction of the act of parliament, the right to recover must be dated from a period not subsequent to the death of the lady; and, therefore, whether regretting or not regretting the conclusion, to that conclusion I must come. But although Mr. *Turner's* application fails with respect to the corpus, I do not think that it fails with respect to the money that has arisen from rents. According to the true construction of this deed, notwithstanding the more restricted language of the recital, the operative part of the instrument gives him, I apprehend, a security upon the interest of Mr. *Ince* in right of his wife in the property of which Mrs. *Cumming* was tenant in tail. Then the question arises, whether, the claim not being opposed by Mr. *Ince*, or by his assignees in bankruptcy, Mrs. *Ince* is entitled to a settlement? Her claim is put upon this,—that Mrs. *Cumming's* interest was equitable and not legal. In a sense the remark is accurate, but only in a sense, and not effectually accurate, if I may so express myself; for she was legal tenant in fee simple in possession, so far as that term can be applied to a copyhold property, subject to an agreement or act affecting her, by which she was under an obligation to cut down her absolute interest to a tenancy in tail. Still, however, her right to the rents was legal, and not equitable merely; and, accordingly, I think that the rule upon which *Sturgis v. Champneys*, and other cases of that description proceeded, has not any application. Perhaps, therefore, Mrs. *Ince* may not be

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be entitled to raise the argument that Mr. *Turner* was a mortgagee out of possession, since it is not raised by Mr. *Ince* or his assignees in bankruptcy. I think that neither Mr. *Ince* nor the assignees could raise that question, because possession was taken on behalf of the creditors of Mrs. *Cumming*, after her death, by a receiver of the Court, upon whom Mr. *Turner* could not enter; and I think that for no present purpose was he bound to proceed by petition or motion in the cause to displace the receiver. I consider him, therefore, entitled to so much of the 400*l.* and a fraction as is constituted of rents accrued since Mrs. *Cumming's* death from that portion of the copyhold property of which Mrs. *Cumming* was, as tenant in fee or tenant in tail, entitled to the inheritance.

The LORD JUSTICE TURNER.

Upon the best consideration which I have been able to give to this act of parliament, my conclusion upon that part of the case is the same as that at which my learned Brother has arrived. This provision in the act is, no doubt, a very singular one; it entirely changes the rights of parties as they stood at the time of the passing of the act, and alters, as it seems to me, the position of creditors, giving a preference to the solicitor over the other creditors. Such, however, being the intention of the legislature, expressed in the act, we are of course bound to carry that intention into effect; and if, therefore, this estate, being an estate tail, falls within the provisions of the act, and the case does not fall within the proviso, Mr. *Turner* is entitled to the order which is prayed by this petition. Upon the question whether an estate tail does or does not fall within the provisions of this act, and of the other similar acts having reference to the property of lunatics, I give no opinion. I think this case

case must be decided upon the proviso; and, according to the best judgment I can form upon the effect of the proviso, I think that Mr. *Turner's* right is precluded by it. The proviso is in these terms:—"That it shall not be lawful for the Court or Judge to make any such order but within six years next after the right to recover such costs and expenses shall have accrued." The right to recover here mentioned must, as I apprehend, mean the right to recover against the lunatic's estate, not the right to recover against third parties, the whole object of the clause being to charge the lunatic's estate. We must, therefore, I think, entirely lay out of the case the fact of a signed bill of costs having, at a subsequent period, been delivered to the parties who employed Mr. *Turner*, and the fact of the six years not having elapsed from the time of the delivery of the signed bill of costs. The question then is, when did the right to recover these costs and expenses against the lunatic's estate accrue. Mr. *James*, who has argued this case, as he does every case, with great ability, says that the right could only accrue upon the taxation of the bill, that the business is not concluded until the bill is taxed, and that it is upon the certificate of taxation that the right to recover accrues; but I think that this is not the true meaning of the act of parliament, for the earlier part of this section gives the power "to make such and the like orders, and to exercise the like power and authority for taxation of and for raising and payment of such costs after the death of the lunatic as could or might have been exercised or made in his lifetime." By the earlier part of the section, therefore, the power is given to make, amongst other orders, an order to tax; but then the proviso says, "that it shall not be lawful for the Court or Judge to make any such order" (which would include an order to tax) "but within six years after the right to recover shall have accrued;" and I do not see how the right to recover

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which is spoken of, can be held to be a right to recover arising upon taxation, when no order to tax is to be made unless the right to recover has accrued within the six years. The earlier part of the section seems to me to put a construction upon the proviso, and makes it clear that the right to recover contemplated by the legislature cannot have been a right to recover accruing upon taxation. Then when could the right to recover contemplated by the section accrue? My learned Brother has stated his opinion to be, that it accrued on the death of the lunatic, but I am not altogether satisfied that it ought to be considered to have accrued at that time. Of this, however, I am quite satisfied, that it must have accrued at the latest at the period when the Court declared the costs and expenses to have been properly incurred on account of the lunatic's estate. Whether it accrued at the death or not, there was an undoubted right to recover the costs the moment it was ascertained that those costs had been properly incurred on behalf of the lunatic's estate. That was at the date of the 4th of *February*, 1854, and this petition was not presented till the 31st of *October*, 1860. I am of opinion, therefore, that Mr. *Turner's* claim upon the corpus of the estate is barred by the proviso. Upon the other parts of the case, I think that, having regard more especially to the provisions of the deed, including what the parties should become entitled to in the lifetime of Mrs. *Cumming*, and to the recital being silent as to what might accrue in her lifetime, it is clear that the intention of the deed was, to pass property beyond what was reached by the recital; and there being that intention, I think we can put no limit on the words, "or otherwise howsoever," which follow and conclude the operative clauses of the deed. I think, also, that this is not a case in which any equity for a settlement attaches. At the outside the only equity is this, that there is an outstanding legal estate in fee,

converted

converted in equity into a legal estate tail ; and I do not think that is a sort of equity to which an equity for a settlement would attach. And as to the rents having accrued, and this being a claim by a mortgagee for past rents, a point ably put by Mr. *Southgate*, I think that the answer to the argument is, that these rents have never got home to the party, but must be considered as outstanding rents laid hold of by creditors in a suit, and to which it has ultimately appeared that the creditors had no title ; and I think that the rents having never got home to the party, the mortgagee is entitled to them.

[There was no order made as to the costs of the petition.]

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BOND v. BARNES.

MR. *HISLOP CLARKE* applied for a transfer of the cause from the Court of Vice-Chancellor *Wood* to the Rolls, the Judges approving.

The LORD JUSTICE KNIGHT BRUCE inquired whether the parties consented, and on being informed that all did except one of the Defendants :

Their LORDSHIPS held that the order could not be made except by consent, or on service.

Application refused.

Nov. 17.
Before The
Lords Jus-
tices.

Where one of the Defendants had neither consented to an application for a transfer of the cause from one branch of the Court to another nor had been served with it, the application was refused, though all the other parties consented.

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## LETT v. RANDALL.

Nov. 8, 20.

Before The

Lord

Chancellor

Lord

CAMPBELL.

A testator devised and bequeathed to trustees, their heirs, executors and administrators, all and singular his freehold, leasehold and copyhold estates, and also all his personal estate, of what nature or kind soever the same might be, upon trust to pay and make up to his wife 1,200*l.* per annum, including any sums of money to which she might be entitled under her late father's will, by equal quarterly payments, for and during the term of her natural life; and directed, that from and after the decease of his

wife the said sum of 1,200*l.* so to be paid to her should go and be equally divided unto and amongst all and every the testator's children who should be then living, share and share alike. Held, that the gift was not of a perpetual annuity, but was limited to the lives of the testator's widow and children.

THIS was an appeal from a decision of Vice-Chancellor *Stuart*, reported in the 3rd volume of *Messrs. Smale & Giffard's Reports* (a), so far as it declared that an annuity of 1,200*l.* given by the will of *William Randall* was perpetual.

The will was dated the 1st *July*, 1824, and after directing payment of the testator's debts and funeral expenses, contained the following disposition, upon which the question upon the appeal arose:—

“ I give, devise and bequeath unto *Thomas Lett* the elder, *Nathaniel Randall* and *Thomas Lett* the younger and their heirs, executors and administrators, all and singular my freehold, leasehold and copyhold estates, and also all my personal estate of what nature or kind soever the same may be or consist of, upon trust to pay and make up unto my dear wife the sum of 1,200*l.* per annum, including any sum or sums of money she may be entitled to under and by virtue of the will of her late father, by equal quarterly payments, for and during the term of her natural life; and upon further trust to pay and divide the residue of my said property unto and amongst all and every my child and children who may be living at the time of my decease, share and share alike, for and during the terms of their natural life; and in case any of my said children, being daughters, shall marry

(a) *Page 83.*

marry and shall happen to depart this life in the lifetime of her or their said husbands, then I direct that the part or share, parts or shares of her or them so dying as aforesaid shall go to and be paid to her or their respective husband or husbands for and during the term of his or their natural life or lives, and from and after his or their decease then to be equally divided unto and amongst all and every the child or children of my said daughter and daughters then living, share and share alike; and in default of any such child or children, then I direct such part or share or parts or shares shall go to and be paid and divided equally, share and share alike (and from and after the decease of my said dear wife, I direct that the said sum of 1,200*l.* per annum so to be paid unto her as aforesaid shall go to and be equally divided) unto and amongst all and every my said dear children who shall be then living, share and share alike. And it is my mind and will, and I do hereby expressly order, direct and declare, that the said bequest, devise, legacy and provision herein by me given and made unto and for my said dear wife as aforesaid are by me meant and intended to be and shall by my said wife be accepted and taken in full and entire lieu, bar, recompense, discharge and satisfaction of and for all and all manner of claims and demands whatsoever which she at any time might or could have, or which, without provision and declaration, she could or might have at the time of my decease of, in, to or out of any part or parts of my real or personal estate, under or by virtue of any settlement or other writing by me at any time made upon or in favor of my said wife, or as or for or on account of any dower or thirds which she my said wife might, could or would in any manner have, claim or challenge or demand out of or upon, or from or in respect of, any part of my estate or effects in any manner howsoever."

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The testator died in 1825, leaving his widow and seven daughters and an only son him surviving.

Of these, the son died in 1854, the widow in 1846; and of the daughters one had died in 1838, leaving issue, another without issue and intestate in 1845, and of the five remaining daughters, three were spinsters at the date of the decision appealed from, another a widow having children, and the fifth a married woman not having had issue.

The Vice-Chancellor, by the declaration under appeal, had decided that the annuity of 1,200*l.*, given by the will, was limited to the lives of the testator's widow and children, and at the death of the last survivor of such children would sink into the residue of the testator's estate.

Mr. Bacon and Mr. C. Hall, in support of the appeal.

This is a legacy of so much of the testator's property as will produce an annuity of 1,200*l.* a year. Upon the language of the will, an intention is shown that a sufficient portion of the income of the testator's property should be appropriated for the payment of the annuity. The case is not distinguishable from *Stokes v. Heron* (a); *Hedges v. Harpur* (b); *Mansergh v. Campbell* (c). They cited also *Bignold v. Gills* (d); *Blewitt v. Roberts* (e).

[*The LORD CHANCELLOR.* Are the trustees to continue for ever to hold the property, and pay out of the income the annuity of 1,200*l.*?]

Mr.

(a) 12 *Cl. & Fin.* 161.(d) 4 *Drew.* 341.(b) 3 *De G. & J.* 129.(e) *Cr. & Ph.* 274.(c) 3 *De G. & J.* 232.

Mr. Malins and *Mr. Wickens* for the daughter of the testator who had died in the lifetime of his widow.

None of the authorities which have been cited furnish any rule at all governing the present case. *Hedges v. Harpur* (*a*) turned upon the particular language of the will. In *Mansergh v. Campbell* (*b*), the object was to give capital, not, as here, income only. The intention of the testator must be collected from the language which he has used. If he had intended the interests of the annuitants to extend beyond their respective lives, he would have limited such interest to their respective issue. The intention to be inferred from the language of the will is, that the annuitants were to take for their lives respectively, and that on the death of the surviving annuitant, the annuity of 1,200*l.* was to sink into the residue.

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Mr. *Greene* and Mr. *Knox Wigram*, for the husband and two children of the daughter of the testator who had predeceased the widow. .

The scheme of the will is, that the whole of the testator's property shall be enjoyed by the testator's children, subject to the payment out of the income of this annuity of £1,200*l.* There is no intention shown of segregating or appropriating any part of the corpus of the property to meet this annuity. It is therefore an annuity for the lives of the widow, and children who should survive her, not a perpetual annuity; *Yates v. Madden* (*c.*).

Mr. J. H. Palmer and *Mr. E. R. Turner* for the Plaintiff, the trustee of the testator's will.

Mr.

(a) 9 *Beru.* 479; 3 *De G. & J.* 129.
(b) 3 *De G. & J.* 232.
(c) 3 *Mac. & G.* 532.

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Mr. C. Hall in reply.

The gift is of 1,200*l.* a year, being a portion of the property vested in the trustees. The case is distinguishable from all those cited against us. The onus probandi is not upon us, seeing that this is not the case of a simple gift of an annuity without reference to a fund appropriated to meet the annuity.

Judgment reserved.

*The LORD CHANCELLOR.**Nov. 20.*

I am of opinion, that the declaration in the decree of Vice-Chancellor *Stuart*, complained of by this appeal, was quite correct.

It is admitted, that if an annuity is bequeathed generally to *A.*, or to *A.* for life, and on *A.*'s death to *B.*, in the one case the annuity expires on the death of *A.*, and in the other on the death of *B.* To make an annuity, created by will, perpetual, there must be express words in the will so describing it, or the testator must, by some language in the will, indicate an intention to that effect. The most common indication is a direction by the testator to segregate and appropriate a portion of his property from the interest or profits of which the annuity is to be paid. Where this is done, the annuity when mentioned in the will, represents the corpus so appropriated, and the corpus passing by the bequest of the annuity, the annuity may be said to be perpetual.

But in the will now to be construed, there are no express words to continue the payment of the 1,200*l.* after the death of the children who survived the widow, and there

there is no segregation or appropriation of any part of the testator's property in respect of the annuity. The testator devises and bequeaths to trustees, "their heirs, executors and administrators, all and singular his freehold, leasehold and copyhold estates, and also all his personal estate of what nature or kind soever the same may be or consist of, upon trust to pay and make up unto his wife the sum of 1,200*l.* per annum, including any sum or sums of money she may be entitled to under and by virtue of the will of her late father, by equal quarterly payments, for and during the term of her natural life."

The trustees could not appropriate any specific portion of this property, real or personal, during the lifetime of the widow, for they were only to make up the allowance to her 1,200*l.*, including any sums she might be entitled to under her father's will. And what part of the property were they to segregate and appropriate? Was it to be from freehold estates? or the leasehold estates? or the copyhold estates? or the personality? and in what proportions? The annuity is charged upon the whole. Nor is there in the bequest over to the children who should survive their mother any direction to segregate or appropriate any portion of the property for their benefit, these being the words of the bequest,—"and from and after the decease of my said dear wife, I direct that the said sum of 1,200*l.* per annum, so to be paid unto her as aforesaid, shall go to and be equally divided unto and amongst all and every my said dear children who shall be then living, share and share alike." They are to take the annuity charged on all his property. If the bequest of the annuity to the children is, as contended, a bequest of the corpus which produces it, what part of the property are they entitled specifically to claim? During the argument, I could obtain no satisfactory

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factory answer to the question I addressed to counsel as to what practical steps it was the duty of the trustees to take for segregating and appropriating a part of the property to form the just corpus of the annuity. It was said that upon an application of the widow or the children, a Court of Equity would compel the trustees to purchase a perpetual annuity of 1,200*l.* For this purpose it would have required at least 40,000*l.*, being the greater part in value of the whole of the property left by the testator. Thereby his intentions respecting the distribution of it among his children would be completely defeated. Immediately after the provision for his widow he adds, "on further trust to pay and divide the residue of my said property unto and among all and every my child and children who may be living at the time of my decease, share and share alike." Then he goes on to direct that if any of his daughters married and died in the lifetime of their husbands, their husbands should be entitled to a certain interest in their shares, and that those shares on the death of the husbands should go to the children of those daughters then living. The scheme of the will is, that all the testator's children should share alike, with the exception that any of them who survived their mother should during their lives divide among them the annuity of 1,200*l.* a year. But if this annuity were to be a perpetuity, the children, or a single child, who survived the mother, would take an absolute interest in the corpus of the annuity valued at 40,000*l.*, all the rest of his children (eight in number) would be left comparatively unprovided for, and there would be no provision for the grandchildren of the testator. It so happened that five of the eight survived their mother, but there might have been one only, and he would have taken the absolute interest in the perpetual annuity. This could not be any particular child whom the testator meant peculiarly to favor, for he could not foresee which

of

of the children were to survive or to predecease their mother.

I consider it, therefore, quite clear that this testator must be taken by his will to have indicated an intention that this annuity of 1,200*l.*, so charged on all his property, real and personal, should be paid by the trustees during the lives of the widow, and of the children who survived her, and no longer.

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The authorities relied upon by the Appellant are broadly distinguishable. The opinion of the House of Lords in *Stokes v. Heron* (*a*), proceeded on the ground of appropriation of a requisite portion of personality to form a fund for the payment of perpetual annuities. *Hedges v. Harpur* (*b*) proceeded on the ground that the testator directed that in case any or either of his daughters should die without issue, the annuity should cease and fall into the residue of his estate, thereby clearly intimating that if they had issue, the annuities should continue. In *Mansergh v. Campbell* (*c*), the annuity was held to be perpetual, because the testator directed the annuity to be sold and the proceeds to be equally divided amongst the children.

There are various authorities which might be cited in support of the decision of the Vice-Chancellor in this case; but it stands sufficiently on principle and the clearly expressed intention of the testator.

Therefore, without further observation, I adjudge that the appeal be dismissed with costs.

(*a*) 12 *Cl. & Fin.* 161.                    (*c*) 25 *Beav.* 544; 3 *De G.*

(*b*) 9 *Beav.* 479; 3 *De G. & J.* & *J.* 232.

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A testator directed that an estate should be settled on S. T. for life, with remainder to his sons successively in tail, remainder to his daughters successively in tail, and that the settlement should contain a power to S. T. to charge the estate with any sum not exceeding 2,000*l.* for the portions of his younger children. S. T. by deed charged the estate with the sum of 2,000*l.* for the portions of his younger children, to be

raised within three months after his decease, and to be equally divided between them. There were five younger children, daughters, two of whom died in S. T.'s lifetime minors and unmarried, another attained twenty-one and died in his lifetime, and two attained twenty-one and survived him. *Held*, that the representatives of the daughter who attained twenty-one and died in the father's lifetime were entitled to a share in the fund.

Whether the representatives of the daughters who died minors in the father's lifetime were also entitled to shares, *quare*

*Per* the Lord Justice Turner, *semble*, they were not.

On the death of the father a moiety of the 2,000*l.* was paid to one of the two surviving daughters, and interest on the other moiety was paid to the other surviving daughter for more than thirty years. *Held*, that this did not estop the owners of the estate from denying her right to receive so much as a moiety of the capital.

## REMNANT v. HOOD.

THIS was an appeal by the Plaintiff from a decree of the Master of the Rolls, the question in dispute being, whether a child who attained twenty-one and married, but died in the lifetime of her parents, had attained an indefeasibly vested interest in a sum raisable for portions.

Sir Nathaniel Thorold, by will dated the 23rd of March, 1763, devised certain real estates to trustees upon trust to settle and assure them by such deeds as counsel should advise to the use of *Samuel Canale* and his assigns during his life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of *Samuel Canale* successively in tail male, with remainder to his daughters successively in tail male, with divers remainders over.

The will contained the following direction:—"Also my will is and I do hereby direct that in such settlement shall be inserted and contained proper powers enabling them the said *Samuel Canale*, *George Thorold*, &c., as and

and when they shall respectively come into and be in possession of my said manors, messuages, lands, tenements and hereditaments, to grant such leases thereof as have been usually made and granted, and also to limit any of my said messuages, lands, tenements and hereditaments whereof he shall then be in the actual possession, not exceeding one-third part thereof, or any rent-charge not exceeding the clear yearly rents of one-third part thereof, in jointure to their respective wives, with proper powers of distress and entry in case of nonpayment thereof, and also a term of years for better securing such rent-charge. And likewise a power enabling them respectively so in possession to charge my said estates with any sum not exceeding 2,000*l.* for the portion of his and their younger children respectively, and all such clauses as are usual for the safety and indemnity of the trustees."

The testator died in 1764. *Samuel Canale*, in compliance with a direction in the will, obtained an Act of Parliament naturalizing him and enabling him to assume the name and arms of *Thorold*. He entered into possession of the devised estates, but no settlement of them was ever made in pursuance of the directions in the will.

In 1771 *Samuel Thorold* intermarried with *Ann Anderson*, and by an indenture of settlement, dated the 29th of August, 1771, made previous to and in contemplation of the marriage, *Samuel Thorold*, in exercise of the power of jointuring given to him by the will of Sir *Nathaniel Thorold*, appointed to the wife for her life certain parts of the estate by way of jointure, and covenanted to make, in certain events, a further provision for her by way of jointure. And in exercise of the power of charging portions, *Samuel Thorold* charged all the testator's estates of which he was in actual possession  
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(subject to the jointure) "with the sum of  $2,000l$ . for the portion or portions of the daughter or daughters, younger child or younger children of the said *Samuel Thorold* on the body of the said *Ann Anderson* lawfully to be begotten, to be raised and levied within three calendar months after the decease of the said *Samuel Thorold* by such ways and means as shall be expedient in that behalf, and to be forthwith paid and payable in manner following, (that is to say,) if there shall be an eldest or only son and one such daughter or younger child, the same to be raised and paid for the portion of such only daughter or younger child; and if there shall be two or more such daughters or younger children, then the said sum of  $2,000l$ . to be equally divided between them, share and share alike, for the portion and portions of all and every such daughters or younger children."

There was issue of the marriage a son and six daughters.

The son died in the lifetime of *Samuel Thorold* his father, an infant and without having been married, and in consequence of his death the eldest daughter *Ann Eliza*, upon the death of the father in 1820, became tenant in tail of the devised estates under the will. In 1822 she resettled them, reducing herself to an estate for life, and died in 1848.

Two others of the daughters died in the lifetime of *Samuel Thorold* their father, infants and without having been married.

*Theodosia*, another of the daughters, married *Leonard Gibbons*, attained twenty-one, and afterwards died in the lifetime of *Samuel Thorold* her father.

The other two daughters married, attained twenty-one, and

and survived their father *Samuel Thorold*, who died on 19th of *January*, 1820.

Sometime after *Samuel Thorold's* decease, a moiety of the 2,000*l.* was paid to one of the surviving daughters, or to her husband in her right, as her share of the fund settled upon the younger children. The sum of 50*l.* was also paid to the other surviving daughter, Mrs. *Moye*, or to her husband in her right, in respect of her share of the settled fund, and she, or her husband in her right, received interest on 950*l.* as the residue of her share during the remainder of her life. She died on the 16th of *September*, 1853.

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The Plaintiff, who had become entitled by assignment to the residue of Mrs. *Moye's* share of the settled fund, after deducting the 50*l.* paid on account, filed the bill in this cause in *April*, 1857, to have that residue raised and paid to him, and claimed to be entitled to 950*l.* in respect of this residue, insisting that the fund became vested in the two daughters who survived their father *Samuel Thorold*.

The Defendants, who were interested in the estates subject to the charge, on the other hand insisted that the daughter who married, attained twenty-one, and died in the lifetime of the father, had a vested interest in the fund, and that the Plaintiff therefore was entitled only to one-third of the fund, after deducting the 50*l.* paid on account.

The title of the Plaintiff was at first wholly denied, but on the 11th of *March*, 1858, nearly a year after the institution of the suit, the persons acting on behalf of the infant tenant in tail of the estate subject to the charge offered to pay the Plaintiff one-third of the 2,000*l.* (deducting

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ducting the 50*l.* paid on account) and to pay the costs of all parties to the suit up to that time. The Plaintiff declined this offer.

The Master of the Rolls, on the 28th of *June*, 1859, decided (*a*) that the Plaintiff was entitled only to one-third of the 2,000*l.*, and gave him his costs of suit up to the 11th of *March*, 1858, but ordered him to pay the subsequent costs of the suit, on the ground of his having proceeded after an offer of all he was entitled to. His Honor allowed one set of costs in respect of each distinct interest in the estate. Thus, for instance, only one set was allowed in respect of a life estate which was vested in *John Hood*, one of the Defendants, subject to two mortgages, one vested in the *Clerical, Medical and General Life Assurance Society* and the Defendants *Hargrave* and *Hue* their trustees, and the other in the Defendant *Harriet Margaret Cookson*, and the sum allowed on taxation in respect of these costs was to be applied in the first place in paying the costs of the assurance society and their trustees, as being the first incumbrancers. The Plaintiff appealed.

Mr. *Roundell Palmer* and Mr. *F. T. White*, for the Appellant.

Apart from the question on the construction of the instruments, we contend that the payment of interest to Mrs. *Moyle* for thirty-three years on the footing that she was entitled to a moiety and not merely to a third, establishes her title to the larger share as against the estates paying it; *Lord Teynham v. Webb* (*b*); *Clifton v. Cockburn* (*c*); *Pickering v. Pickering* (*d*). If the case be one to which the Statute of Limitations is applicable our title is made complete by the lapse of time.

Now

(*a*) 27 *Beav.* 74.

(*b*) 2 *Ves. sen.* 198.

(*c*) 3 *M. & K.* 76.

(*d*) 4 *M. & C.* 289, 304.

Now as to the construction of the instruments. The whole gift is woven up with the direction to raise at the death of the father, and no time personal to the legatees is mentioned, which distinguishes this case from an important class of cases in which two periods are named, one of which is personal to the legatee. The cases on the subject are summed up thus in Mr. Cox's note to *Duke of Chandos v. Talbot* (a):—“With respect to all interests arising out of land, the rules on the subject are totally different from those relating to legacies given out of personality, for, whether the land be the primary or auxiliary fund, whether the charge be made by deed or will, as a portion or a general legacy for a child or a stranger, with or without interest, the general rule is, that charges upon land payable at a future day shall not be raised where the party dies before the time of payment.” It is submitted that the rules as to portions are distinct from those relating to general legacies not given in the character of portions, there not being the same presumption in favor of the inheritance in the case of legacies as in the case of portions. The cases which Mr. Cox refers to as exceptions from the general rule are—(1) cases where portions are not merely postponed till the expiration of a life estate, but are also made payable to the children on twenty-one or marriage, or on the happening of any other event personal to themselves. This shows that the postponement to the end of the life is merely for the advantage of the tenant for life, and that the portions are intended to become vested indefeasibly on the happening of the events personal to the portionists. These cases have led to the use of two forms of expression, “postponement for the convenience of the estate” and “when the portions are wanted,” which seem to have misled

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(a) 2 P. Wms. 601.

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misled the Master of the Rolls. The point of convenience to the estate arises only when a contingency personal to the legatee is named as well as a contingency not personal to him. If no personal contingency is named, there is nothing to show that the sum was intended to be raised if the portionist be not living at the time spoken of, and the general rule applies. (2) The second class of exceptions is, where the charge is vested in possession, but a time is allowed to the owner of the estate to raise it, as for instance, where portions vested at twenty-one are made payable twelve months after a person's death. This is a form of postponement for the convenience of the estate. The third class is not so well defined. The cases on which the general rule is founded are *Powlett v. Powlett* (a), and *Bond v. Brown* (b), which show the distinction in this respect between a simple legacy and a legacy payable out of land. *Earl Rivers v. Earl Derby* (c), though referred to, is not much in point. *Bruen v. Bruen* (d), with the additional fact supplied by Mr. Raithby's note, shows, that where no time is fixed except that the legacies are only raisable under the trusts of a term which does not commence till after the death of the parents, a daughter who dies a minor in the lifetime of the parents cannot take. This is almost decisive of the present case. *Tournay v. Tournay* (e) is not now to be relied on to its full extent, but it affirms the general principle. *Jennings v. Looks* (f); *Gordon v. Raynes* (g); *Butler v. Duncomb* (h), are all in our favor. *Bradley v. Powell* (i) is an important case: Lord Talbot there examines the authorities and lays

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(a) 1 *Vern.* 204, 231.(f) 2 *P. Wms.* 276.(b) 2 *Ch. Ca.* 165.(g) 3 *P. Wms.* 138.(c) 2 *Vern.* 71.(h) 1 *P. Wms.* 448; 2 *Vern.*(d) 2 *Vern.* 439; *Pre. Ch.* 760.(i) *Ca. Temp. Talb.* 193.

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(e) *Pre. Ch.* 213, 290.

stress on the circumstance that no other time than the time of raising was spoken of. The case is on all-fours with the present, except in not being a clear case of portions. In *Emperor v. Rolfe* (a), the attaining twenty-one or marrying was mentioned, and the Lord Chancellor said, that the mention of those events showed that the interest was to vest upon either of them happening. There are many other cases proceeding on the same ground. In *Prowse v. Abingdon* (b), Lord *Hardwicke* gives as the reason for the general rule, the maxim that the heir is entitled to favor; *Hall v. Terry* (c). *Lord Teynham v. Webb* (d), which was much relied on at the Rolls, is inapplicable. The remarks of Sir *W. Grant* referred to in the judgment of the Master of the Rolls mean no more than that the Court will struggle to make the interest absolute on the attainment of twenty-one or marriage, if the will refers to those periods. In a case like the present there is no medium between excluding those who die before the time of payment and letting in all the minors, there being nothing in the will to authorize the making majority or marriage a condition of taking. *Whatford v. Moore* (e) is somewhat in our favor, but as it turned on the special wording of the will we do not rely much on it. [*Fry v. Lord Sherborne* (f); *Smith v. Smith* (g), and *Carter v. Bletsoe* (h), were also referred to.]

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[During the course of the Appellant's argument the LORD JUSTICE KNIGHT BRUCE suggested the point, whether the children who had died minors and unmarried during the

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| (a) 1 <i>Ves. sen.</i> 208. | (e) 3 <i>M. & C.</i> 270. |
| (b) 1 <i>Atk.</i> 482, 486. | (f) 3 <i>Sim.</i> 243, 259. |
| (c) 1 <i>Atk.</i> 502; 8 <i>Vin. Abr.</i>
383, <i>Pl.</i> 36. | (g) 2 <i>Vern.</i> 92. |
| (d) 2 <i>Ves. sen.</i> 198. | (h) 2 <i>Vern.</i> 616. |

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the tenancy for life had not acquired an indefeasible title to shares in the fund? Counsel for the Respondents stated that they did not wish to urge this nor to contend that the Plaintiff was entitled to less than one-third.]

*The LORD JUSTICE KNIGHT BRUCE.* With respect to the question of acquiescence, the argument of the Plaintiff amounts to this, that because he has for a length of time received half the interest, he is to be held entitled to half the capital. In my judgment this payment of interest cannot affect the title to the capital.

*The LORD JUSTICE TURNER.* I am of the same opinion. I think that none of the authorities go further than this, that interest paid by mistake under such circumstances cannot be recovered back.

Mr. *Lloyd* and Mr. *Martineau*, for the infant tenant in tail, in support of the decree.

The Master of the Rolls was right in ordering the Plaintiff to pay the costs subsequent to our offer. The bill is not one for administration of the estate, but a bill to enforce a particular view of the construction of the instrument, and not adapted for any other purpose. Then as to the merits, the object of the Appellant is to make out that "younger children" means "younger children who survive their parents." The cases referred to are mostly cases where on death in the lifetime of the parents the money sunk for the benefit of the estate, and it is sought by the Appellants to make them authorities for holding that the charge does not sink but vests for the benefit of the other children. In *Evans v. Scott* (a), the

(a) 1 *H. of L. Ca.* 43, 57.

the rule deduced from the old cases is laid down thus :—  
 “ It is a well-established rule as to portions or legacies payable out of land, that if made payable at a certain age, marriage, or other event personal to the party to be benefited, and such party die before that time arrive, the portion or legacy is not to be raised out of the land ; but if the payment be postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid, such as the death of a tenant for life, then it will be raisable after the death of the tenant for life, although the term out of which it was to be raised had not arisen in consequence of the party to be benefited not having been in esse at the time of the death of the tenant for life ; ” *Mostyn v. Mostyn* (a) ; *Sugd. Real Prop.* (b). In *Lord Teynham v. Webb* (c), the decision was that a child must be a younger child at the time of payment in order to take. Lord *Hardwicke* does not say in terms that the portions vest in children attaining twenty-one, though they do not survive their parents, but the whole course of the reasoning tends to that conclusion. *Woodcock v. Dorset* (d) is a strong illustration of this rule, the word “ leaving ” being used. *Hope v. Lord Clifden* (e) applies the same rule. *Jennings v. Looks* (f) is wholly inapplicable. *Gordon v. Raynes* (g) turned on special words. Some of the cases on which the Appellant relies were cases in which no event personal to the legatee was expressly mentioned. In *Prowse v. Abingdon* (h), the legatee died before the event personal to himself had happened ; and the general expressions in the judgment must be read with reference to the circumstances

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- (a) 1 Coll. 161.
- (b) Page 143.
- (c) 2 Ves. sen. 198.
- (d) 3 Bro. C. C. 569.

- (e) 6 Ves. 499.
- (f) 2 P. Wms. 276.
- (g) 3 P. Wms. 138.
- (h) 1 Atk. 482.

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stances of the case. *Hall v. Terry* (*a*) went on the principle that there was no gift except in the direction to raise the money. In *Boycott v. Cotton* (*b*), the child died before the event personal to herself had happened. The ground on which the not paying the representatives of a person dying before the time named for payment has been put is the benefit of the estate, and there is not a single case supporting the Plaintiff's view that they are to be excluded for the benefit of other legatees. *Lord Hinchingbrooke v. Seymour* (*c*) is against the Plaintiff.

Mr. Faber and Mr. Mander, for different mortgagees.

Mr. Follett and Mr. Wickens for **John Hood**, the purchaser of a life estate in the property subject to mortgages affecting the life estate.

The Duke of Chandos v. Talbot (*d*) shows the rule as to vesting. A child does not take who dies under twenty-one and unmarried, so as not to want a portion. Then, as to costs, we contend that from the time of the offer the Plaintiff ought to pay our costs, and that the decree is erroneous in giving only one set of costs in respect of the life estate. That is the rule in administration suits where costs are paid out of the fund; but there is no analogy between that case and the present. From the time of the offer the Plaintiff was in the wrong, and the true analogy is to a case where the bill is dismissed with costs, and there the Plaintiffs must pay the costs of all the Defendants, no classification of interests being made.

Mr. Shapter, Mr. W. D. Griffith and Mr. Nalder for other parties.

Mr.

(*a*) 1 *Ath.* 502.
 (*b*) 1 *Ath.* 555.

(*c*) 1 *Bro. C. C.* 394.
 (*d*) 2 *P. Wms.* 601.

Mr. E. R. Turner for another Defendant.

Evelyn v. Evelyn (a) shows the old rule as to portions. *Brathwaite v. Brathwaite* (b) appears to be the first case confining portions to those children who attain twenty-one or marry, which rule is carried out in *Tunstall v. Bracken* (c) and *Lowther v. Condon* (d).

Mr. R. Palmer in reply.

The principle as to the vesting of portions is not that the Court favors the owner of the inheritance, but that, as to charges on real estate, the rules of the common law are followed. This is laid down by Lord Hardwicke in *Prowse v. Lord Abingdon* (e). It does not follow that, because those rules of construction were originally established with a regard to the benefit of the owner of the inheritance, they are to be followed to all the consequences to which a regard to his benefit might lead. If a gross sum be directed to be raised for portions of younger children who attain twenty-one or marry, those who answer the conditions will take the whole among them. *Evans v. Scott* (f) was not a case of that nature, but one in which several sums were given to the children who should severally answer the conditions. Lord St. Leonards, in the passage referred to on the other side, states the general rule in conformity with my argument. The cases in which the time of payment has been held not to be the time of vesting are cases in which the Court had to choose between inconsistent contingencies; *Bradley v. Powell* (g). In *Lord Hinchingbroke v. Seymour* (h), referred to by the Respondents, loose language is used as to a child's not wanting a portion; but,

(a) 2 P. Wms. 659.

(e) 1 Atk. 482.

(b) 1 Vern. 335.

(f) 1 H. of L. Ca. 43.

(c) 1 Bro. C. C. 124.

(g) Ca. Temp. Talb. 193.

(d) 2 Atk. 127.

(h) 1 Bro. C. C. 394.

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but, as the case is now understood, it has no bearing on the present question. It is explained by Lord *Eldon* in *Macqueen v. Farquhar* (*a*), and has never been followed in specie where an appointment to an infant child was made *bonâ fide*; *Butcher v. Jackson* (*b*); *Fearon v. Desbrisay* (*c*); *Beere v. Hoffmister* (*d*). The cases cited by Mr. *Turner* are cases where no particular time of payment was named; the gift was vested in possession, and there was nothing to prevent the receipt of it but the personal inability of the portionist to give a discharge, and so in *Earl Rivers v. Earl Derby* (*e*). As to costs, the Plaintiff was forced into Court by the absolute denial of his title, and it is too severe to visit him with costs, because in so doubtful a case, after having been driven to litigation, he declined to accept less than what he had for so many years been treated as entitled to.

Judgment reserved.

*The LORD JUSTICE KNIGHT BRUCE.**Nov. 20.*

I am of opinion, that, according to the true construction of the will of Sir *Nathaniel Thorold* and the deed of the 29th of *August*, 1771, Mrs. *Gibbons*, who attained her majority and married, but did not survive her father, acquired by force of those instruments, as one of the younger children of the marriage between *Samuel Thorold* (originally called *Samuel Canale*) and *Ann Anderson*, a vested interest in a share of the 2,000*l.* charged by that deed, and that the interest so acquired was not divested, taken away, or destroyed, by the circumstance that Mrs. *Gibbons* died in his lifetime. I think that neither by the will nor by the deed nor by both together was

(a) 11 *Ves.* 479.(d) 23 *Beav.* 101.(b) 14 *Sim.* 444.(e) 2 *Vern.* 72.(c) 14 *Beav.* 635.

was it made essential to the title of any younger child of the marriage to a share in the 2,000*l.* that that younger child should survive *Samuel Thorold*; accordingly, in my judgment, there having been seven children of the marriage, three only of whom survived their father, among which three, who all attained majority, were the eldest daughter and Mrs. *Moye*, a younger child, her share in the 2,000*l.* was not more than a third, if it was so much. Whether it was less than a third we have been relieved by the counsel from the necessity of deciding, and I assume, therefore, that it was not less; without, however, giving any opinion upon the point, for I acknowledge myself not satisfied that neither of the daughters of *Samuel Thorold*, who in his lifetime died infants without having married, acquired a vested interest in any part of the 2,000*l.*

The interpretation, however, of the two instruments that admits Mrs. *Gibbons* among those who severally acquired vested and undefeated interests in the 2,000*l.* appears to me consistent with the rules and idiom of the English language, with reason and convenience, and with the preponderance of authority on the subject, nor at variance with any intention upon the part of Sir *Nathaniel Thorold* or *Samuel Thorold* to be collected from either the will or the settlement. And as I continue of the opinion expressed by me as well as by my learned Brother on a former day, that the amount claimable by the Plaintiff in respect of Mrs. *Moye's* share has not been increased by means of any acts or conduct on the part of any person, I must hold that the decree gives the Plaintiff at least as much of the 2,000*l.* as he is entitled to. But I consider that the declaration contained in it had better be varied, for the purpose of showing that the Court does not, and why it does not, decide, whether Mrs. *Moye's* share was of right less than a third. With regard

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regard to the costs of the suit, the assignment demanded from the Plaintiff was not made by him a ground of objection or treated by him as material, and notwithstanding the length of time during which Mrs. *Moye* was treated as having become entitled to half of the 2,000*l.*, I think that the decree does justice as to costs; subject to this, however, that as among the Defendants the arguments concerning the costs of Sir *Charles Anderson* and Messrs. *Johnson* and *Bridgman* seem not without weight, and it may be right to make some alteration under this head. My learned Brother's impression is, that the Plaintiff should not pay the whole costs of the appeal, and though doubting whether he should not do so, I am willing that of the appeal he should pay no costs except his own and those of his two trustees.

*The Lord Justice Turner*, after stating the facts of the case, proceeded as follows:—

Upon the hearing of the appeal, a doubt was suggested whether the two children who died infants, and without having been married, in the lifetime of the father, did not also take vested interests in the settled fund; but this point was not insisted upon on the part of the Defendants, and it is unnecessary therefore for us to give any opinion upon it.

It is well settled, as a general rule, that legacies or portions charged on real estate, and payable at a future time, do not vest until the time appointed for the payment of them, but upon the death of the legatee or portioner before that time lapse and sink into the inheritance. This rule, however, though general, is not universal. If the payment of the legacy or portion is postponed, not from any considerations personal to the legatee or portioner, but simply for the convenience of the estate, the legacy or portion may vest notwithstanding the death  
of

of the legatee or portioner before the time appointed for payment. The Court, seeing the purpose for which the payment was postponed, does not consider the postponement to draw with it the consequences which would otherwise attach upon it. It does not allow a provision which was intended for one purpose to be used for another and different purpose. In such cases the postponement of payment not evidencing the intention whether the legacy or portion was in the meantime to be vested or not, the Court is driven to resort to the other parts of the instrument and to its object and purpose in order to ascertain what the intention, in this respect, may have been. It is for this reason, as I apprehend, that we do not find any uniform course of decision as to the vesting of portions payable at a future time; that in some cases they have been held to vest in children of very tender years; in other cases, only in children who have attained the age or position at which the portion would be required; and again in other cases, although the cases of this latter class are as I believe very rare, only in children who have survived their parents. Each case has depended upon the construction of the particular instrument by which the portions have been given. In the case, for instance, of *Bradley v. Powell* (*a*), in which a child who died in the father's lifetime was held not to have become entitled to the portion, and upon which so much reliance was placed on the part of the Appellant, the Court evidently proceeded upon the ground that the instrument distinctly pointed to the child's surviving the father, and so again in the case of *Whatford v. Moore* (*b*).

In the case before us, there can, I think, be no reasonable doubt that the payment of the portions was postponed for the convenience of the estate. The limitations

of

(*a*) *Ca. Temp. T. 193.*

(*b*) *3 M. & C. 270.*

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of the settlement seem to me to indicate plainly that the purpose of the postponement was that the estate might not be charged with the portions to the prejudice either of the father or of the mother, and I think, therefore, that the time when the portions were to be payable cannot govern the question when they were to become vested, but that that question must be determined on the construction of the other parts of the instrument and upon its object and purpose. There are three periods at which the portions may have been intended to vest; the period of the birth of the children; the period at which they would require their portions, which, according to the ordinary habit in such cases, as evidenced by the usual course of settlement, would be at twenty-one, or as to daughters on marriage; and the period of the death of the parents. Looking both to the language and to the purpose of this instrument, I can see nothing which in anyway imports that the portions were not intended to vest during the lives of the parents; and to adopt the period of the death as the time of vesting, would be to deprive the provision of that certainty which it must, I think, fairly be taken to have been the object of the settlement to secure. It would render the interests of the children contingent upon their surviving their parents, and deprive them of the means of making any certain provisions for their families during the whole of their parents' lives. This is a result against which the Court has struggled, and successfully struggled in many cases, and I think therefore that we should not be justified in adopting this period as the time of vesting in the absence of anything on the face of the instrument indicating that it was so intended. Between the other two periods, it is not, as I have said, necessary for us to decide; but I think it right to state, that I lean to the opinion, that, in this particular case, the true period of vesting was at twenty-one or as to daughters on marriage. The consequence of

of holding the portions to vest at the birth would be, that the shares of children dying in early infancy would go to the parent, thus contravening the purpose of the settlement by giving to the father what was intended for the children ; and the Court in these cases seems to have regarded rather the purpose than the words of the instrument. In some of the cases, indeed, the Court seems almost to have carried into effect the purpose of the instrument in opposition to the words, and although in the later cases more weight has been given to the terms of the instrument, there can be no doubt that in cases of this nature very great attention must be given to the purpose of the instrument. That doctrine is to be found as early as in the case of *King v. Withers* (*a*), and it may be traced through all the cases. It is to be observed, too, that in this case the instrument merely charges the 2,000*l.* for the portions, and does not otherwise purport to give them to the children, so that the vesting seems to be left rather upon the purpose than the words of the instrument. It not being necessary, however, to decide the point, and my learned Brother thinking it better that the declaratory part of the decree should be qualified so as to leave the question between these two periods of vesting undecided, I do not dissent from the qualification which he has suggested.

It was said for the Appellant, that in all the cases in which the periods of attaining twenty-one or marrying had been held to be the periods of vesting, there was some reference to those periods in the instruments creating the portions, and that we should be going beyond the authorities in adopting those periods in a case in which there was no such reference ; but the case of *Brewin v. Brewin* (*b*) seems to me to warrant the conclusion at

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(*a*) *Ferr.* 122.

(*b*) *Pre. Cha.* 195.

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which we have arrived, and there have been other cases to the same effect.

Another point, which was much discussed upon the argument of this appeal, was as to the mode in which the Master of the Rolls has disposed of the costs of the suit. It appears that in the progress of the cause an offer was made on the part of the infant Defendant to pay the Plaintiff his costs and one-third of the 2,000*l.*, deducting the 50*l.*, and also to pay the costs of all parties up to the time of the offer, and the Master of the Rolls, by the decree, has given the Plaintiff the costs of the suit up to that time, and thrown upon him all the subsequent costs. I confess that I am not altogether satisfied with this mode of disposing of the costs, and that I doubt whether, having regard to the nature of the question and to the circumstances of the case, more particularly to the payment which had been made to the other daughter and to the payment of the interest on the share of the 2,000*l.* which was claimed by the Plaintiff, the more proper course might not have been to have given the Plaintiff no costs of the suit, and to have thrown the costs of the other parties upon the estate. It was argued on the part of the infant Defendant that this would have been unjust to her, but I am not satisfied of this, for the great expense of this suit has arisen from the number of the parties, and those parties were rendered necessary by the acts of those who preceded the infant in estate. Costs, however, are much in the discretion of the Judge, and I do not think it would be right to alter the decree in this respect merely upon the ground that, had the case been originally before me, I might probably have arrived at a different result. There seems to have been some mistake in drawing up the decree as to the costs of the Defendant *Anderson*, and some omission as to the costs of the Defendants *Johnson* and *Bridgman*. I think the set of costs

costs allowed to *Anderson* and his cestui que trust should be paid to *Anderson*, and that the costs of the Defendants *Johnson* and *Bridgman* should be provided for upon the same footing as those of the other parties interested in the estate ; but, subject to the alterations to which I have referred, I think the decree must be affirmed.

As to the costs of the appeal, I think the Appellant should pay the costs of his trustees, the Defendants *Mawer* and *Moore* ; but, under the circumstances of the case, and having regard to the mode in which the costs have been disposed of by the decree, the Appellant should not be saddled with any other costs of the appeal. The other Defendants must add their costs to the incumbrances or have them raised out of the estate.

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## BOWSER v. MACLEAN.

Nov. 10, 12,  
21.

THIS was an appeal from the decision of Vice-Chancellor *Stuart* allowing a demurrer to the Plaintiff's bill, and refusing a motion for an injunction with costs.

Before The  
Lord  
Chancellor  
LORD  
CAMPBELL.

The material statements on the bill, which was filed by *R. Bowser, J. Humphries and T. Peacock*, against *Sir Charles F. Maclean*, were to the following effect :—

The lord may drive carriages along a tramway under copyholds of the manor, for the purpose of working mines within the manor, but not of working mines beyond the its limits, and a bill will lie

The Plaintiff *Richard Bowser* is in equity seised to him and his heirs of the lands, tenements, hereditaments and premises called the *Cockton Hill* estate, situate in

for an injunction at the suit of a copyholder to restrain the lord from using the tramway for the latter purpose; nor is it an objection to such a bill that the copyholder is not in possession of the surface, but has let it to a tenant.

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the township of *Bondgate-in-Auckland* and parish of *Saint Andrew's Auckland*, in the county of *Durham*, and such estate is copyhold or customary freehold of the manor of *Bondgate-in-Auckland*, formerly part of the possessions of the see of *Durham*, but now belonging to and vested in the Ecclesiastical Commissioners in right of the said see; and, in accordance with a custom of the said manor in that behalf, the said estate is now vested in the Plaintiffs *John Humphries* and *Thomas Peacock*, and their sequels, as tenants on the rolls of the court of the said manor, upon trust for the Plaintiff *Richard Bowser*, his heirs and assigns; and the Plaintiff *Richard Bowser* has let the said estate for nine years past to one *Ralph Hutchinson*, as farmer of the surface thereof only from year to year.

The Defendant Sir *Charles Fitzroy Maclean* is the owner or proprietor of a colliery called the *Woodhouse Close Colliery*, the pit or shaft of which is sunk upon a farm called the *Woodhouse Close Farm*, which one *Francis Johnson* holds under lease from the said see of *Durham*, and the Defendant is lessee of and works the coal mines of the said see of *Durham* under the copyhold or customary lands comprised in the said manor of *Bondgate-in-Auckland*, and the said Defendant draws such coals to the bank or surface at the said *Woodhouse Close Colliery*.

The Plaintiff *Richard Bowser* recently discovered that the Defendant, Sir *Charles Fitzroy Maclean*, had for some time past been working or getting the coal under an estate called the *Henknoule* estate, the property of Messrs. *Seymour*, and no part or parcel of the said manor of *Bondgate*, or of the possessions of the lords or owners of the said manor, or of the lessors of the said *Woodhouse Close Colliery*, and that the Defendant has

so worked and brought the said coals from the said *Henknowle* estate to the surface at the said *Woodhouse Close Pit* by conveying the same by an underground railway or tram-road through the said *Cockton Hill* estate of the Plaintiff *Richard Bowser*, and that the Defendant has also drained and ventilated the workings of the said *Henknowle* coal by roads or ways through the said *Cockton Hill* estate.

The bill also stated applications to the Defendant to desist from using the tramway, and that he had not complied with them.

The prayer was, that the Defendant Sir *Charles Fitzroy Maclean*, his viewers, agents and workmen, might be restrained by injunction from conveying any coal or other produce from the said *Henknowle* estate through the *Cockton Hill* estate, or any part thereof, and from making or allowing any road or way to remain through the said *Cockton Hill* estate for the purpose of conveying any such coal or other produce, or for the purpose of draining or ventilating, or in any manner working, or enabling or assisting the Defendant to work or get any coal or other produce out of the said *Henknowle* estate, or any other estate or property not comprised in and held of the manor of *Bondgate-in-Auckland*. That an account might be taken of all coal and other produce conveyed from the *Henknowle* estate by the Defendant through the *Cockton Hill* estate, and also of all coal and other produce wrought and gotten out of the *Henknowle* estate by the Defendant which had been drained or ventilated through the *Cockton Hill* estate, and that the Defendant might pay the Plaintiff *Richard Bowser* for all the underground wayleave and privileges which he had enjoyed in working and getting the coal, and also the damage sustained by the Plaintiff *Richard Bowser*.

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from the said acts of the Defendant Sir *Charles Fitzroy Maclean.*

The arguments urged by counsel upon the appeal are stated in the judgment.

Mr. *Malins* and Mr. *T. Bates*, in support of the bill, cited *Mitchell v. Dors* (*a*) ; *Hanson v. Gardiner* (*b*) ; *Lewis v. Branthwaite* (*c*) ; *Keyse v. Powell* (*d*) ; *Farrow v. Vansittart* (*e*) ; *Powell v. Aiken* (*f*) ; *The Earl of Mexborough v. Bower* (*g*) ; *Thomas v. Oakley* (*h*) ; *Grey v. Duke of Northumberland* (*i*).

Mr. *W. D. Lewis* and Mr. *N. Lindley*, contra, cited *Deere v. Guest* (*k*) ; *Jesus College v. Bloom* (*l*) ; *Cowling v. Higginson* (*m*).

Mr. *Malins* replied.

Judgment reserved.

#### *The LORD CHANCELLOR.*

Nov. 21. I am of opinion that in this case the demurrer ought to have been overruled.

The objection to the bill chiefly relied upon in the Court below was that the Plaintiffs show no title to the place in which the wrong complained of is alleged to have

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| (a) 6 <i>Ves.</i> 146.           | (g) 7 <i>Bon.</i> 127.           |
| (b) 7 <i>Ves.</i> 305—308.       | (h) 18 <i>Ves.</i> 184.          |
| (c) 2 <i>B. &amp; Ad.</i> 437.   | (i) 17 <i>Ves.</i> 281.          |
| (d) 2 <i>Elt. &amp; Bl.</i> 132. | (k) 1 <i>Myl. &amp; Cr.</i> 516. |
| (e) 1 <i>Railw. Ca.</i> 602.     | (l) 1 <i>Amb.</i> 54.            |
| (f) 4 <i>K. &amp; J.</i> 343.    | (m) 4 <i>Mee. &amp; W.</i> 245.  |

have been committed, and no possession of the subsoil of *Cockton Hill* estate, through which runs the way improperly used by the Defendant. But the bill alleges that the Plaintiffs are seised of *Cockton Hill* estate, which is described as copyhold or customary freehold of the manor of *Bondgate*, and that the surface only of this estate is let to one *Hutchinson* as farmer thereof from year to year. *Prima facie* the soil from the surface to the centre of the earth belongs to the Plaintiffs, and the possession of the whole, except the surface so let, remains in the Plaintiffs. This being copyhold the property in the minerals is in the lords of the manor, and they have let all the coal mines within the manor of *Bondgate* to the Defendant. For the working of these mines the Defendant has a right to make a tramway through the subsoil of the *Cockton Hill* estate, and to carry along this tramway any coals which he may dig within the manor. But the Defendant has no right to drive carriages along this tramway for any other purpose besides working the minerals, &c., within the manor. But the bill avers that he drives along this tramway carriages loaded with coals dug beyond the limits of the manor, that he may bring them to the surface by a pit within the manor. Now this is clearly an illegal use of the tramway, for the Defendant as lessee of the coal strata within the manor is justified only in making such a use of the subsoil of the copyhold tenements as the lord himself might make for working the coal within the manor. Without working the coal within the manor, the lord could not lawfully make a tramway through the subsoil of the manor for the purpose of carrying upon it coals dug elsewhere, and if he did he would be liable to an action of trespass at the suit of the copyhold tenants. As little can he lawfully use the tramroad which he has made lawfully for the carriage of coals within the manor for the purpose

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of driving along it carriages loaded with coals dug beyond the limits of the manor.

But it is said that the Plaintiffs are not in a situation to sue for this wrong as, on account of the leases of the surface and the minerals, they show no title or possession, and they cannot be dammed by the alleged wrong. I am of opinion, however, that the alleged lease of the minerals to the Defendant can be no more than a transfer to him of what might have been lawfully done by the lord of the manor for working the minerals. The possession still remains in the copyholder subject to the property of the minerals being in the lord and the easements of the lord in working the minerals. The law upon this subject is fully settled by the two cases of *Lewis v. Branthwaite* (*a*), and *Keyse v. Powell* (*b*). I am inclined to think that a mistake has been committed in not distinguishing between a copyhold tenement with minerals under it, and freehold land leased with a reservation of the minerals, or freehold land, where the surface belongs to one owner and the subsoil, containing minerals, belongs to another, as separate tenements divided from each other vertically, instead of laterally. If this had been such freehold land the owner of the surface could not have complained of the making or of the excess in using a tramway through the subsoil. But the Plaintiffs seised in fee of this copyhold, though, at the will of the lord, after letting the surface only, are in possession of the subsoil, subject to the rights of the lord in getting the minerals according to the custom of the manor. Therefore, they are injured by the unlawful use of the tramway. The amount of the injury, if infinitesimally small, is immaterial in considering whether this demurrer should be allowed or overruled.

According

(*a*) 2 B. & Ad. 437.(*b*) 2 Ell. & Bl. 132.

According to the short-hand writer's note the Vice-Chancellor rested his decision on this, that "the Plaintiff *Bowser* has not averred that the tramway is his." But there was no necessity for such a specific averment if the bill avers facts showing that the subsoil over which the tramway is carried belongs to *Bowser* and is in his possession, subject to the lord's property in the minerals and the Defendant's easement. The bill avers, that the Defendant having got coals under the *Henknowle* estate, beyond the limits of the manor of *Bondgate*, had brought these coals by the tramroad through the *Cockton Hill* estate of the Plaintiff *Bowser*, and also had drained and ventilated the workings of the *Henknowle* coal by roads or ways through the said *Cockton Hill* estate. Such allegations seem to me to place the Defendant in the same condition of liability as if he had had no interest whatsoever in the minerals under the *Cockton Hill* estate, or any part of the manor of *Bondgate*, and he had been a wrongdoer in the making of the tramway, as well as in the use of it. For these reasons the objection, that the Plaintiffs show no title in, and no injury to, themselves, seems to me to be untenable.

But the counsel for the Defendant have strenuously argued before me that, if this were so, still the Plaintiffs are confined to an action of trespass or some other legal remedy. In considering this objection we must bear in mind that the bill complains of a secret and clandestine use of the railway, that the Defendant is charged with making a profit by this surreptitious use of the way, and that the bill contains the statement of the Defendant having broken the soil in the mines under *Cockton Hill* estate, belonging to the Plaintiffs, for the purpose of making a communication between these mines and another mine in his occupation beyond the limits of the manor, and having ventilated this mine with air from the

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the mines within the manor, obtained by the barrier between them being thus broken. Can it be said that all this is a mere dry trespass, for which a Court of Equity will supply no remedy? *Deere v. Guest* (*a*), was very properly cited on behalf of the Respondent; but, in that case, there were not the circumstances of aggravation which characterize the present case. In subsequent cases, where such circumstances have occurred, an injunction has been granted; and let me remark that I am not here called upon to decide that an injunction shall be granted, but to consider whether it be so clear that an injunction cannot be granted, that the bill is demurable.

I do not think that *Thomas v. Oakley* (*b*), and similar cases, where there has been an exportation of valuable minerals or a destruction of part of the inheritance, are authorities in support of the present suit. But *Lord Mexborough v. Bower* (*c*); *Powell v. Aiken* (*d*), and *Farrow v. Vansittart* (*e*), are at least authorities to show that under such a bill as this it is possible that, consistently with the principles of equity, it may turn out that the Plaintiffs are entitled to some part of the remedy which they pray. I am far from saying that the allegations in the bill, if sufficient to require an answer, conclusively show that the Plaintiffs are entitled to the injunction prayed for, or to the account or discovery. Upon an answer and evidence it may turn out on the hearing that, from acquiescence and the minuteness of the injury, or some right which the Defendant may disclose, the Court may refuse the injunction and dismiss the bill. But the demurrer for want of equity I think cannot hold, and, reversing the decision of the Vice-Chancellor, I must order that the demurrer be overruled with costs.

(*a*) 1 *Myl. & Cr.* 516.

(*d*) 4 *K. & J.* 343.

(*b*) 18 *Ves.* 184.

(*e*) 1 *Railw. Ca.* 602.

(*c*) 7 *Bent.* 127.

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NORTH-EASTERN RAILWAY COMPANY
v. ELLIOTT.

Nov. 15, 16,
24.

THIS was an appeal from an order for an injunction granted by Vice-Chancellor *Wood*.

Before The
Lord
Chancellor
LORD

CAMPBELL.

The facts of the case are fully stated in the report of the hearing below in Messrs. *Johnson & Hemming's Reports* (a).

A railway company was empowered by its special act to take lands, but the minerals were to be reserved to the vendor, who was to be at liberty to work them, causing no damage or obstruction to the railway; and by another clause of the act it was provided that, on working up to within twenty yards of any masonry or building of the company, the owner of the minerals might require the company to purchase the

The following short summary of them is sufficient for the purposes of the present report.

The Plaintiffs were a company in which, by various acts of parliament, all the rights and privileges of the *Durham Junction Railway Company* had become vested.

The *Durham Junction Railway Company* was incorporated by the *Durham Railway Junction Act, 1834, 4 Will. 4, c. lvii*, which, amongst other enactments, contains the following:—

Sect. 12. “And whereas the said railway is intended to be carried over the river *Wear*, at or near to a place

called

(a) *Vol. 1, p. 145.*

minerals within that range, or, on their neglect to do so, might work them in the usual and ordinary way, doing no avoidable damage.

The company in 1837 purchased land from the Defendant under their compulsory powers, for the purpose of erecting a bridge, which was accordingly built and completed in 1838. On the lessee of the minerals from the vendor notifying to the company his intention of renewing the working of the minerals, which had been abandoned since 1791—*Held*, a proper case for granting an injunction—as to land within the twenty yards, against working so as to cause damage until the conditions of the act had been satisfied; and as to other workings beneath or adjoining the company's land, against working so as to affect the stability of the bridge, or the railway or other works of the company.

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called *Biddick*, in the county of *Durham*, by means of a bridge or viaduct; and whereas it is expedient to provide against the injury that may be occasioned thereby to the free navigation of the said river, be it therefore enacted that the said railway company shall, and they are hereby required, at their own expense to build in a proper manner a good, firm and substantial bridge or viaduct of brick, stone, wood or iron, or of all or any of these materials, over the said river; and that the piers of the said bridge or viaduct shall be placed in such situations and be constructed in such manner as shall be required by Sir *John Rennie*, or other the person appointed by the Lords Commissioners of the Admiralty, under and by virtue of an act passed in the eleventh year of the reign of King *George* the Fourth, intituled ‘An Act for the Improvement and Preservation of the River *Wear*, and Port and Harbour of *Sunderland*, in the County Palatine of *Durham*;’ and that the spring of the arch of the bridge or viaduct, in case an arch shall be used, shall commence at a point not being less than thirty-five feet above the surface of the water according to the low water level thereof.”

Sect. 27. “Provided always, and be it further enacted, that nothing in this act contained shall extend to give to the said company any coal, stone, slate or other mineral under any lands, tenements or hereditaments purchased by the company under the authority of this act (except only so much of such stone, slate or mineral as shall be necessary to be dug or carried away or used for the purposes of this act), but all such coal, stone, slate or mineral not necessary to be so dug, carried away or used as aforesaid shall be deemed to be excepted out of the purchase of such lands, tenements and hereditaments, and may be worked by the respective owners and lessees of such coal, stone, slate or mineral under the said lands, tenements

tenements and hereditaments, or under the railway or other works of the said company, as if this act had not been passed, so that no damage or obstruction be done or thereby occur to or in such railway or other works: provided, nevertheless, that in case any damage or obstruction shall be so done or occur to or in such railway or other works, the same shall be forthwith repaired or removed (as the case may require) by and at the expense of the respective owners or lessees of such coal, stone, slate or mineral as aforesaid; and, if the same shall not forthwith be done, it shall be lawful for the said company to repair such damage, or to remove such obstruction, and to recover the expenses attending the same, in case of neglect or refusal to pay the same within twenty days after demand thereof, by distress and sale of the goods and chattels of such respective owners or lessees, or by action of debt, or on the case, in any of his Majesty's Courts of Record at *Westminster*."

Sect. 28. "Provided also, and be it further enacted, that whenever, in the working or getting of any such coal, stone, slate or mineral, the owners or lessees thereof, or other persons working the same, shall approach within twenty yards of any masonry or building belonging to the said company, the person directing the working of any such coal, stone, slate or mineral shall give notice in writing thereof to the said company, and within fourteen days after the service of such notice the said company, or the directors of the said company to be appointed as hereinafter mentioned, may deliver to such person a declaration in writing, under the common seal of the said company, that they require the coal, stone, slate or mineral under such masonry or building, so lying within twenty yards thereof (or so much thereof as shall be specified in the said declaration) to be reserved for the protection of such masonry or building; and in that

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that case the said company shall purchase and pay the persons entitled to the same for the coal, stone, slate or mineral so reserved; and in case the said company and such person shall not agree as to the price to be paid for the said coal, stone, slate or mineral so reserved, the same shall be settled by a jury in manner hereinafter mentioned. And in case the said company or the said directors shall not deliver such declaration as hereinbefore mentioned, the said owners, lessees or other persons may work or get the said coal, stone, slate or mineral under the said masonry or buildings; provided the same be worked in the usual and ordinary manner of working mines, and that no avoidable damage be done to the masonry or buildings."

In 1837 the *Durham Junction Railway Company* purchased, under the compulsory powers of their act, a strip of land forming part of the estate of a Mr. *Boulcott*, and abutting on the river *Wear*. The purchase of the land was effected by the company with a view to its forming the foundation of the abutment of one end of a bridge of great weight, which they had commenced building over the river *Wear* pursuant to the provision to that effect contained in the 12th section of their act. This bridge, known as the *Victoria Bridge*, was completed in the year 1838, the abuttal of one end thereof resting upon the purchased land as a foundation. At the time of the purchase there was beneath the land purchased and a large tract of the adjoining land, belonging to Mr. *Boulcott*, an old mine, the workings of which, having been drowned in 1791, were then abandoned, and the mine had ever since remained full of water. From 1791 to the time of the filing of the bill the water had stood in the shaft communicating with levels under the purchased land to the height of about eighty fathoms above those levels. From the evidence, it appeared that vertical support was afforded to the surface

surface of the purchased land chiefly by pillars left in the mine, but that a considerable per-centage of the support was given by the hydrostatic pressure of the water communicated from the shaft. There was also evidence tending to show, that the removal of the water from the levels of the mine would be likely to weaken the pillars.

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In 1859, the Defendant, who had become the sole lessee of the mines and minerals underneath the purchased land and underneath the adjacent lands of Mr. *Boulcott*, under a lease granted by Mr. *Boulcott* in 1856 to the Defendant and another, notified to the Plaintiffs his intention to work the mines, and for that purpose to pump the water out of the shaft.

The company then filed the bill in this suit, praying for an injunction to restrain the Defendant from taking away any of the water or coal underneath the purchased land or the land adjoining thereto, which was necessary for the stability or security of the *Victoria Bridge*. Upon the cause coming on to be heard on motion for decree, the Vice-Chancellor made an order to the effect that the Defendant should be restrained from taking away any of the coal, stone, slate or minerals from underneath the Plaintiffs' land purchased by the *Durham Junction Railway Company* from *Boulcott*, or any land within twenty yards of any masonry or buildings belonging to the company, or from otherwise working the mines under the said piece of land or within such range of twenty yards in such a manner as to occasion any damage or destruction to the railway or other works of the company, unless such notice should have been first given by him as is required by the 28th section of the *Durham Junction Railway Act* of 1834, and the company should have neglected to deliver such declaration as in that section named; and that the Defendant should further be

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be restrained from working any of the minerals under or in the land adjoining the said piece of land, the property of the company, and not being within twenty yards of any masonry or building belonging to the company, in such a manner as to affect the stability of the *Victoria Bridge* and railway, or other works in the bill mentioned. The order to be without prejudice to the Defendant's right to pump out or otherwise remove the water in the shaft in the bill mentioned, the Court being of opinion that he was entitled to drain the said shaft.

Mr. *Rolt*, Mr. *Dickinson* and Mr. *Hannen* in support of the appeal.

The Plaintiffs have not alleged by their bill, and certainly not proved, that damage would be occasioned to the railway by the works contemplated by the Defendant. There is nothing therefore to support the injunction, which ought not to have been granted upon a mere allegation of probable damage; *Earl of Ripon v. Hobart* (*a*); *Haines v. Taylor* (*b*). We do not dispute the right to lateral support in the case of a voluntary conveyance; *Humphries v. Brogden* (*c*); but we say that the rule ceases to be applicable if the conveyance by which the warranty of support is supposed to be given is not a voluntary conveyance, but a compulsory conveyance under an act of parliament; *Fletcher v. The Great Western Railway Company* (*d*); *Rowbotham v. Wilson* (*e*). The terms of the injunction, even if the Plaintiffs are entitled to one, are too vague, and do not define with sufficient clearness the acts which the Defendant is to be prohibited from doing; *Cother v. The Midland Railway Company* (*f*). They cited also *The Dudley Canal Navigation Company v. Grazebrook* (*g*).

Sir

- (*a*) 3 *Myl. & K.* 169.
- (*b*) 10 *Bew.* 75.
- (*c*) 12 *Q. B.* 739.
- (*d*) 4 *Hurl. & N.* 242.

- (*e*) 6 *Ell. & Bl.* 593; 8 *Ell. & Bl.* 123.
- (*f*) 2 *Phil.* 469.
- (*g*) 1 *B. & Ad.* 59.

Sir *Hugh Cairns*, Mr. *Mellish* and Mr. *Hobhouse* for the Respondents.

The act was never intended to have the effect of depriving the company of that support, both vertical and lateral, which they would have been entitled to under an ordinary conveyance from an owner in fee. The conveyance in this case is in the form given in the 21st section of the act, and the true intent and meaning of the terms of that conveyance is, that the land is conveyed for the purpose of constructing the railway and erecting the necessary works upon it. The terms of the conveyance give the right of support unless the act of parliament takes it away. The 27th section in terms gives that right, so far from taking it away. The act gives the company no power to purchase the adjacent land situate more than twenty yards from any masonry or building belonging to the company, and if they have no right of support, it may then become impossible for them to make the railway, the construction of which is authorized by the act; *The Dudley Canal Navigation Company v. Grazebrook* (a); *The Caledonian Railway Company v. Sprot* (b); *The Caledonian Railway Company v. Lord Belhaven* (c); *The Imperial Gaslight Company v. Broadbent* (d).

Mr. *Dickinson*, in reply, cited *The Lancashire and Yorkshire Railway Company v. Evans* (e).

Judgment reserved.

**The LORD CHANCELLOR.**

I am of opinion that the injunction appealed against has been properly granted. The Appellant begins by objecting

Nov. 24.

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| (a) 1 <i>B. &amp; Ad.</i> 59. | (d) 7 <i>H. of L. Cas.</i> 600. |
| (b) 2 <i>Macq.</i> 449.       | (e) 15 <i>Bean.</i> 322.        |
| (c) 3 <i>Macq.</i> 56.        |                                 |

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objecting that the injunction ought to have been refused on the ground that the Plaintiffs have not alleged by their bill nor proved any act of the Defendant by which they are injured, or any threat of the Defendant to do any act by which they can be injured. But the bill alleges that the Defendant in the month of *February*, 1859, served the Plaintiffs with a notice of his intention to work the mines underneath the land purchased from Mr. *Boulcott*, on which the *Victoria Bridge* is erected, and underneath the adjoining land; that the Plaintiffs immediately warned the Defendant that he could not take away the coal from under the said piece of land or the adjoining land without endangering the *Victoria Bridge* and infringing the rights of the Plaintiffs; that on receipt of such warning the Defendant discontinued the proceedings which he had commenced, but afterwards notified to the Plaintiffs his intention to resume such proceedings; that the Defendant is still threatening and intending to resume such proceedings; that the support of the coal underneath and adjoining to the said piece of land is necessary to the stability of the said *Victoria Bridge*, and that great and irreparable damage will ensue to the Plaintiffs if the Defendant is allowed to resume his works.

The Defendant, by his answer, does not deny these allegations as to his acts and intentions, and, on the contrary, he insists on his right to do all that he had threatened to do, and he very explicitly expresses his desire that his right to do so should be judicially determined. The notice was in evidence and the affidavit of *Richard Kechals* shows that it was to be acted upon. Where then is the use of citing cases to prove (what is not disputed) that to obtain an injunction it is necessary to show that an injury has been done or threatened to the party who asks it?

The

The first part of this injunction applying to minerals under the land on which the bridge stands is objected to on the authority of the case of the *Dudley Canal Company v. Grazebrook* (a). But the act of parliament to be construed in that case is materially different from the act of parliament on which the present case depends. In this act of parliament the 27th section reserves the minerals under the railway or other works of the company, and declares that they may be worked as if the act had not passed, "so that no damage or obstruction be done or thereby occur to or in such railway or other works." This section extends to all the land to be purchased for the use of the railway, and is quite in harmony with the 28th section, which provides for what is to be done when the owners of the minerals approach within twenty yards of any masonry or buildings belonging to the company, when a notice is to be given to the company, and the company may purchase the minerals under such masonry or building so lying within twenty yards thereof, to be reserved for the protection of such masonry or buildings, and in case the company do not require to purchase such minerals under the said masonry or buildings, the persons to whom the minerals are reserved may work and get the said minerals under the said masonry or buildings, provided the same be worked in the usual and ordinary manner of working mines, and that no avoidable damage be done to the said masonry or buildings.

But the great struggle which the Appellant has made has been against the right of lateral support claimed for the bridge and the land on which it stands, to be afforded by the adjacent land of the Defendant. He freely admits the general law upon this subject as settled by *Humphries v. Brogden* (b), and subsequent cases, and acknowledges

(a) 1 B. & Ad. 59.

(b) 12 Q. B. 739.

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acknowledges that the Plaintiffs would have been entitled to the lateral support which they claim, if *Boulcott* had voluntarily sold and conveyed the land on which the bridge is erected. He denies this right to lateral support because *Boulcott* sold and conveyed the land under the compulsory powers of an act of parliament. But can it be supposed that the legislature intended that, when the owner of the land had so sold and conveyed it for a particular purpose, he could, in derogation of his grant, deprive it of lateral support, without which it must be wholly unfit for the purpose for which it was sold and conveyed? The conveyance, which refers to the act of parliament, coupled with the plan shown upon it denoting the part of the land on which the abutment of the bridge was to be constructed, clearly indicated the purpose to which the land was to be applied, and can it be supposed that the vendor, when the bridge was erected, should be at liberty to withdraw from it the lateral support, without which it could not stand? He suffers no hardship from the restraint, for when the value of the land on which the bridge was to be erected was estimated the possible deterioration of the adjoining land, by reason of the support required from it, would necessarily be taken into consideration. It is objected that this bridge across the *Wear* is a wonderful work of engineering art, requiring extraordinary support, and that there was upon the conveyance no specification of its elevation or of its materials. But, although the bridge be of one arch of extraordinary span, there is no reason to believe that it was not skilfully and prudently planned and executed, and in the Court below the Defendant took no such point against the injunction. The power of the legislature to deal with such matters cannot be disputed; and when the legislature required such a conveyance to be executed, must not the conveyance, when executed, have all the usual incidents of such a conveyance, and must not the estate,

estate, thereby vested in the purchasers, have all the usual rights, privileges and protection to which such an estate is entitled?

However, it is unnecessary further to reason upon the subject, for the law which the Plaintiffs contend for was solemnly laid down and acted upon by the House of Lords in the recent case of the *Caledonian Railway Company v. Sprot* (*a*). Reliance is placed by the Appellant on the subsequent case of *Fletcher v. The Great Western Railway Company* (*b*); but an inferior Court could not overrule the decision of the House of Lords, and (as might be expected) the two cases when compared together are in their facts and circumstances materially different.

Nothing remains but the objection, that even if the Plaintiffs were entitled to an injunction, both as to working the minerals under their own land and under the Defendant's land, this injunction is too sweeping and indefinite, and the injunction ought to have exactly described and ascertained the portion of the Defendant's land to which the injunction was to apply. In my opinion it would have been absurd to have attempted à priori to determine how near the Defendant should be allowed to work to the Plaintiffs' railway or other works, or to draw a line for his guidance; and the injunction is properly framed when it forbids the taking of the minerals in the Plaintiffs' land purchased from *Boulcott*, or in the adjoining land held by the Defendant, which had belonged to *Boulcott* when he executed the conveyance under which the Plaintiffs claim, "in such manner as to affect the stability of the *Victoria Bridge* or the railway or other works of the Plaintiffs in the bill mentioned."

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(*a*) 2 *Macq.* 449.

(*b*) 4 *H. & N.* 242.

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The right is thus determined as the Defendant in his answer expressed a desire that it should be, and the Defendant at his peril is required to observe the plain and simple rule which the Court has laid down for him. I am therefore of opinion that the appeal should be dismissed with costs.



Nov. 21, 23,  
 26.

Before *The  
 Lord  
 Chancellor  
 Lord  
 Campbell.*

Foreign correspondents of a London firm direct the firm to purchase for them Mexican Bonds to a specified amount, at a specified price, and to hold the bonds at the disposal of the correspondents.

The London firm make and notify the purchase, and write to the correspondents that they will, until further order, retain the bonds for safe custody. Held, that the letters constituted a special contract sufficient

to exclude a general lien on the part of the London firm, if they would otherwise have been entitled to any.

*Semblé*, that a general lien cannot be claimed according to any general law of principal and agent, but only as arising from dealings in some particular trade, as to which a custom to that effect has been established.

#### BOCK v. GORRISEN.

THIS was an appeal from the decision of the Master of the Rolls, holding that the Respondents were entitled to a lien on certain Mexican Bonds which had been deposited with some of the Respondents, and on this ground dismissing the Plaintiff's bill.

For some time previously and up to the month of November, 1857, Johann Julius Lomer and David Gustav Uhde, two of the Defendants, carried on the business of merchants in partnership at Humbergh, under the style or firm of "Julius Lomer & Uhde," and traded chiefly with Mexico.

The Defendants August William Gorrisen, Vincent Amandus Hüffel and Gottlieb Adolph Freudentheil, who previously and up to the month of November, 1857, carried on the business of merchants in partnership in London, under the style of "Gorrisen, Hüffel & Co.", acted as correspondents of Lomer & Uhde in London, and received and paid money on their behalf, and occasionally

occasionally accepted bills of exchange drawn upon them by the Plaintiffs, who made remittances to secure or reimburse the *London* firm in respect of such remittances.

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On the 18th ~~of~~ June, 1857, the *Hamburgh* firm wrote to the *London* firm as follows:—

" If you can buy Mexican £3 per Cent. Bonds at 22*l.* 10*s.* per cent., and, as you arranged with our *Lomer*, will draw on us there-against at three months' date, but charge in the whole for the purchase and drafts only one-half per cent. on the actual value for commission, we request you will take 10,000*l.* for us and hold them at our disposal."

The *London* firm accordingly bought on behalf of the *Hamburg* firm sixty-nine Mexican Bonds, purporting to secure 10,000*l.* sterling, and on the 2nd of *July* the *London* firm apprised the *Hamburg* firm of the purchase by a letter in the following terms:—

" Our last of the 29th ult. we presume to be in your possession, and the object of the present is to intimate to you that we have effected the purchase of 10,000L Mexican £3 per Cents. at your limit. We hand you annexed the account thereof, the amount of which, 2,267L 15s. 1d., with which we debit you, we will reimburse ourselves upon you to-morrow at the exchange of the day."

The account annexed to the last-mentioned letter was as follows:—

*"Messrs. Jul. Lomer & Uhde, Hamburg, Drs.*

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The expenses and commission and stamps made the amount  $2,267l. 15s. 1d.$

**GORRISEN.** The next day, *July 3rd*, the *London* firm drew drafts on the *Hamburg* firm for the amount of their account in respect of this transaction ( $2,267l. 15s. 1d.$  and the stamp), which were duly honored and paid at maturity.

On the 4th of *July* the *Hamburg* firm wrote to the *London* firm as follows:—

*"Hamburg, 4th July, 1857.*

"**Messrs. G. H. & Co., London.**

"Leaving untouched the dispositions in your favor of the 27th ulto. and 2nd inst., we have booked in conformity your account for 10,000*l.* Mexican £3 per Cent. Bonds,  $2,267l. 15s.$ , and expect to-morrow advice of your drafts, which shall be duly honored for this amount. Of what do the petty charges (4*s.* 6*d.*) in this account consist? We request you in the meanwhile to keep the bonds in safe custody, and at your convenience to give us the numbers of the same."

On the 6th day of *July*, 1857, the *London* firm sent to the *Hamburg* firm a letter to the purport following:—

"Since the despatch of our respects of the 3rd instant we received your favour of the following day.

"In compliance with your wish we will, until further orders, retain for safe custody the 10,000*l.* £3 per Cent. Mexican Bonds bought for you, and we annex at foot a statement of the numbers of these papers for convenient service."

And at the foot of the letter was annexed a list of the numbers of the bonds.

On the 19th of *November* the *London* firm wrote to the

the *Hamburg* firm, to state that they had been compelled to stop payment. The letter proceeded in these terms.

"The misfortune which has overtaken us is, without doubt, already known to you. The blows which we sustained have been too hard to allow of the possibility of saving ourselves. We have deeply to regret that you also are interested with us; we can, however, give you the assurance that your Mexican Bonds lying with us are unjeopardized."

On the same 19th of *November* the *Hamburg* firm wrote to the *London* firm—"We request you to send us the 10,000*l.* Mexican Bonds by post, registered, and with declaration of value."

To this the *London* firm, on the 21st of *November*, replied as follows:—

"Your wish for us to send you the 10,000*l.* Mexican Bonds resting with us we are not, alas, in a position to comply with, since it is not permitted to us to part with them until the whole of our liabilities with you are run off. Meanwhile the bonds are in safe keeping with us, and you may be quite easy as to that."

The affairs of the *London* house were wound up under an inspectorship deed, pursuant to the 224th section of the Bankrupt Law Consolidation Act, 1849.

The *Hamburg* firm also suspended their payments, and the Plaintiffs, in *December*, 1857, were appointed by the Court of Commerce of *Hamburg* to be co-administrators of their estate.

The inspectors of the *London* firm refused to give up the bonds to the administrators of the *Hamburg* firm until

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until they had been paid the balance of what was due from the *Hamburg* to the *London* firm, and which was stated to amount to 7,000*l.*

The bill was filed by the administrators of the *Hamburg* firm against the *London* firm and their inspectors, praying that the Defendants might be ordered to deliver up the Mexican Bonds to the Plaintiffs.

The Defendants insisted that, by custom and course of dealing, the *London* firm were, as factors and foreign bankers, entitled to a lien on all goods, monies and securities of the *Hamburg* firm in their hands, to cover, and as an indemnity against, the general balance due to them from the *Hamburg* firm.

The Master of the Rolls, in giving judgment, said (a) he was at a loss to discover in the letters anything amounting to any special contract or agreement as to the manner or conditions on which the bonds were to be held. His Honor considered the expressions used those of a simple ordinary transaction, by which a person employed as agent by a principal to buy bonds for him did so, and informed him that he had executed his commission. That if the *London* firm had been instructed to buy the bonds for the purpose of being handed over to or to be held at the order of a third person, the case would have assumed a very different aspect, but that these bonds were bought by the *London* firm as agents of the *Hamburg* firm for that purpose, and were held by them under their entire control merely as the agents of the *Hamburg* house. His Honor was of opinion, that the first contention of the Plaintiffs failed, and that such expressions as to be "held at our disposal," and the like, amounted to no special contract

(a) The Reporters are indebted Judgment below.
to Mr. Beavan for a note of the

contract or evidence of a deposit for any particular purpose. The case of the Plaintiffs must therefore, his Honor held, depend upon whether, on the general law, and having regard to the peculiar relation of these two firms towards each other, the *London* firm could retain the bonds, which had been fully and duly paid for, until the balance due to them from the *Hamburg* house on account of other transactions had been satisfied. His Honor was of opinion that they could. The nature of the dealing between the *Hamburg* firm and the *London* firm appeared to his Honor from the evidence, especially from the correspondence, to have been of this character,—that the *Hamburg* firm was in the habit of employing the *London* firm to enter into speculations on their behalf in securities and other matters in the *London* market, and that when the *Hamburg* firm bought from English manufacturers goods to be consigned to them in *Hamburg*, they occasionally opened a credit with the *London* firm in favor of the shippers of their goods, and remitted money and bills to meet the charges of the Defendants, and that for all these purposes they were employed by the *Hamburg* firm, and acted as their agents. Upon the most careful examination of the agreements of the Plaintiffs, his Honor was unable to discover any principle which would entitle a factor to a lien for his general balance on the goods of his principal, which would not apply to the case of such an agency as that which existed in the present case or which would not entitle the Defendants to a lien for their general balance on any securities which came into their possession as such agents of the *Hamburg* firm. It being established by the case of *Branda v. Barnett* (a) and by several other cases that this lien exists in the case of bankers, and by the case of *Jones v. Peppercorne* (b) that the lien exists in case of brokers

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(a) 12 *C. & F.* 798.

(b) 1 *Johns.* 430.

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brokers, his Honor asked upon what reasonable principle an exception could be made in the case of a firm in *London* employed by a principal abroad to buy and sell securities in the *London* market. His Honor was of opinion, wholly independently of any evidence of custom, that, according to the general law of agent and principal in mercantile dealings and transactions, the Defendants were entitled to a lien on these bonds for their general balance, and that, accordingly, the only decree which he could make in this suit was to dismiss the bill, and he decreed accordingly.

From this decision the Plaintiffs now appealed.

Mr. *R. Palmer*, Mr. *De Gex* and Mr. *Gurney* in support of the appeal.

There are two questions in this case:—1st. Whether the *London* house had any general lien independently of special contract. 2ndly. If they had, is not the special contract in this case sufficient to exclude such a lien. Now the *Hamburg* firm had no dealings with the *London* firm, either as bankers or as factors. The mere drawing and re-drawing of bills between merchants will not create the relation of banker and customer between them; *Richardson v. Bradshaw*(a); *Hankey v. Jones*(b). Nor were they factors; the circumstance of one merchant requiring another to buy for him shares will not make the latter the factor of the former. But if by a strained construction of the words "banker and factor" you could apply those terms to the *London* firm, still the money would be due to them in one character while their right to retain was in the other, and there would be no lien; *Dixon v. Stansfield*(c); *Weldon v. Gould*(d).

And

(a) 1 *Atk.* 128.

(c) 10 *C. B.* 398.

(b) *Coupl.* 745.

(d) 3 *Esp.* 268.

And we further submit that there is no law entitling an agent as such merely to a lien, unless he is one of such a description as to be within some general custom which has been established, giving him a title to a general lien.

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But in the next place, we submit that, whatever might have been the rights of the parties independently of contract, here the contract excludes any right of lien; *Branda v. Barnett* (*a*).

They also referred to *Walker v. Birch* (*b*); *Lucas v. Dorrien* (*c*); *Buchanan v. Findlay* (*d*); *Forth v. Simpson* (*e*); *Jackson v. Cummins* (*f*).

Mr. Selwyn and Mr. Gurney appeared for the *Han-*  
*burgh* firm.

Mr. Follett and Mr. Druce, for the inspectors under the deed of arrangement executed by the *London* firm.

The evidence shows that the *London* firm were factors, and as such they have a general lien on all the property of the principal coming to their hands; *Zinck v. Walker* (*g*). At all events they were their agents. [The LORD CHANCELLOR: You must bring the person within a particular class of agents to establish a general lien.] This agency can only be regarded as that of a factor. No other relation than that of factor and principal is made out by the evidence. *Dixon v. Stansfield* (*h*), cited on the other side, is in our favor, for the dealings here were wholly those between principal and factor.

With

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|-----------------------------------------------------------------------------|----------------------------------------|
| ( <i>a</i> ) 12 <i>Cl. &amp; Fin.</i> 787, 798,<br>800, 806, 807, 808, 809. | ( <i>c</i> ) 13 <i>Q. B.</i> 680.      |
| ( <i>b</i> ) 6 <i>T. R.</i> 258.                                            | ( <i>f</i> ) 5 <i>M. &amp; W.</i> 342. |
| ( <i>c</i> ) 7 <i>Taunt.</i> 278.                                           | ( <i>g</i> ) 2 <i>W. Bl.</i> 1154.     |
| ( <i>d</i> ) 9 <i>B. &amp; C.</i> 738.                                      | ( <i>h</i> ) 10 <i>C. B.</i> 398.      |

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With respect to the argument upon the special contract, the words "at our disposal," which are relied upon, only mean "hold them for us," and do not import any special contract. If a customer told his bankers to hold securities at his disposal, would such a direction create any contract different from that which would exist independently of it? A banker or a factor necessarily holds his principal's goods at the disposal of the latter, but not so as to exclude the lien of the former. [*The LORD CHANCELLOR*: Is it the argument that these words have no operation?] We submit that to displace the implied contract for a lien arising from custom, a clear stipulation must be made out inconsistent with the implied contract, and that no such inconsistent stipulation is here established.

They referred to *Jones v. Peppercorne (a)*.

Mr. *Lloyd* and Mr. *Baggallay* for the *London* firm.

Mr. *A. E. Miller* for bill holders.

The following authorities were also referred to:—  
*Wallace v. Woodgate (b)*; *Giles v. Perkins (c)*; *Chase v. Westmore (d)*.

Mr. *R. Palmer* in reply.

Judgment reserved.

#### *The LORD CHANCELLOR.*

Nov. 26.

In this case I do not think it necessary to give any opinion as to whether, if the bonds in question had been purchased

(a) 1 *John.* 430.

(c) 9 *East*, 12.

(b) *Ry. & Moo.* 193.

(d) 5 *Mau. & S.* 180.

purchased by the *London* house for the *Hamburg* house in the common course of their dealings, without any special agreement confined to this particular transaction, the *London* house would have had a general lien on the bonds in respect of all the liabilities of the *Hamburg* house. But I am bound to say that I cannot entirely concur in the view which his Honor the Master of the Rolls appears to have taken of this question, if he said, according to the report of his judgment in the *Jurist*, "wholly independent of any evidence of custom according to the general law of principal and agent in mercantile dealings and transactions, the Defendants are entitled to a lien on these bonds for their general balance." I do not think that a general lien can be claimed according to any general law of principal and agent. The law of *England* does not favor general liens, and I apprehend that a general lien can only be claimed as arising from dealings in a particular trade or line of business, such as wharfingers, factors and bankers, in which the custom of a general lien has been judicially proved and acknowledged, or upon express evidence being given that, according to the established custom in some other trade or line of business, a general lien is claimed and allowed. I rather think, however, that his Honor, without intending to lay down any universal rule for giving a general lien in all dealings between principal and agent, arrived at the conclusion that from the dealings between these two houses, they came within the category of "factors" or "bankers," with respect to whom it has been proved, and often judicially acknowledged, that there is a general lien, unless where there is an express agreement to the contrary or a particular mode of dealing inconsistent with a general lien.

Whatever the rights of these parties might have been,  
had there been no special agreement between them  
respecting

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respecting the purchase and custody of these bonds, I am of opinion that the evidence proves such a special agreement to have existed, that this special agreement negatives the claim set up on behalf of the *London* house of a general lien, and that the decree ought to have been in favor of the Plaintiffs.

Looking at the whole of the correspondence between the two houses concerning these bonds from first to last, I think that this is shown to have been a separate, isolated dealing on a particular footing, which was meant to be and was (in mercantile language) "brought to a point," and that according to express stipulation between the parties the bonds, when purchased and paid for, might at any time have been demanded by the *Hamburg* house from the custody of the *London* house, and disposed of as the *Hamburg* house might think proper.

The order to purchase was given by *Lomer & Co.*, the *Hamburg* house, to *Hüffel & Co.*, the *London* house, in the letter of the 18th June, 1857, in these words :—

" If you can buy Mexican £3 per Cent. Bonds at 22*l.* 10*s.* per cent., and, as you arranged with our Mr. *Lomer*, will draw on us there-against at three months date, but charge in the whole for the purchase and drafts only one-half per cent. on the actual value for commission, we request you will take 10,000*l.* for us, and hold them at our disposal. This order remains in force eight to ten days. Should unfavourable news arrive, we leave it to you to execute the order or not."

Here there is a particular stipulation for the time and manner in which *Hüffel & Co.* were to be reimbursed for their advance, a particular stipulation for the exact amount of the commission, and a particular stipulation for

for the bonds when purchased by *Hüffel & Co.* being held by them at the disposal of *Lomer & Co.* *Hüffel & Co.* were not to give any general credit to *Lomer & Co.* for the price of the bonds, and the price of the bonds was not to be mixed up with their general dealings.

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The order being accepted according to the terms proposed, *Hüffel & Co.* purchased and paid for the bonds, and in their letter of the 2nd of *July*, 1857, say:

"This to inform you that we have effected the purchase of 10,000*l.* Mexican £3 per Cents. at your limit. We hand you annexed the account thereof, the amount of which is 2,267*l.* 15*s.* 1*d.*, with which we debit you. We will reimburse ourselves upon you to-morrow at the exchange of the day."

Accordingly on the 3rd of *July*, *Hüffel & Co.* wrote as follows:

"Herewith we advise you that against the amount of our bought note for 10,000*l.* £3 per Cent. Mexicans of 2,267*l.* 15*s.* 1*d.*, together with 3*l.* 10*s.* 5*d.* stamps and brokerage, together 2,271*l.* 5*s.* 6*d.*, we this day took the liberty to issue the following drafts upon you:—

B <sup>m</sup> 13,515 10 0	{	3 months date, order <i>Saalfeld Brothers.</i>
4,054 10 0	}	
3,900 0 0		3 months date, order <i>J. H. Droege.</i>
9,227 6 0		3 months date, order <i>Kraeutler &amp; Mieville.</i>
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B <sup>m</sup> <u>30,697 11 0</u>		

which we recommend to your kind protection, and by which, at the exchange of 13 per 8*½*, we balance the above transaction under the usual reserve."

On the 4th of *July*, *Lomer & Co.* wrote to *Hüffel & Co.* :—

"We have booked in conformity your account for 10,000*l.*

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v.

Gorriissen.

10,000*l.* Mexican £3 per Cent. Bonds for 2,267*l.* 15*s.*, and expect to-morrow advice of your drafts, which shall be duly honored for this amount. Of what do the petty charges (4*s.* 6*d.*) in this account consist? We request you in the meanwhile to keep the bonds in safe custody, and at your convenience to give us the numbers of the same."

It is said that the request to keep the bonds in safe custody is only an expression of what otherwise was to be implied, and therefore to be entirely disregarded; but is it not rather to be understood in reference to the term in the original order, that the bonds were to be at the disposal of the purchasers?

*Hüffel & Co.* seem to have attached this meaning to it, and to have considered that it was a special stipulation with respect to these bonds, for in their letter of the 5th of *July* they say:—"In compliance with your wish we will until further orders retain for safe custody the 10,000*l.* £3 per Cent. Mexican Bonds bought for you." Is not this a promise that, retaining bonds in their safe custody till an order should come for their being delivered up, when such an order came the bonds should be delivered up and disposed of according to the order?

On the 10th of *August*, *Lomer & Co.* wrote to *Hüffel & Co.* that they have paid the bills drawn for the price of the bonds, "balancing your invoice of £10,000 £3 per Cent. Mexican Bonds which remain with you, inclusive of stamps and brokerage, amounting to 2,271*l.* 5*s.* 6*d.*"

I must say that I think *Hüffel & Co.* were now mere custodians of the bonds, without any right of lien either general or special. Nothing further occurs in the correspondence touching the bonds till the 19th of *November*,

*November*, 1857, when *Lower & Co.* having heard a report that *Hüffel & Co.* were in difficulties, wrote a letter to them alluding to the report and containing this important postscript,—“ We request you to send us the 10,000*l.* Mexican Bonds by post, registered, and with declaration of value.”

On the same 19th of *November*, *Hüffel & Co.* wrote a letter to *Lomer & Co.* announcing that they had actually stopped payment, and adding:—“ We have deeply to regret that you are also interested with us. We can, however, give you the assurance that your Mexican Bonds lying with us are unjeopardized, and the greatest care will be taken of the interest of all our creditors.”

The only other material letter is one of the 19th of *December*, from *Lomer & Co.*, in which they announce that they too have been obliged to stop payment, and to *Hüffel & Co.*:—“ We regret that you have not sent us the 10,000*l.* Mexican Bonds, as we probably should have given them as your security for your drafts upon us, or our drafts upon you. We perceive that they lie with you as a deposit until we have fulfilled our obligations towards you.”

Irrespective of this last letter, I must say that the claim of general lien is negatived by the whole of the correspondence. The law upon the subject was laid down and acted upon by the House of Lords in the case of *Branda v. Barnett* (*a*), and sitting here, I must hold, that, although parties carry on a trade or business in which a general lien is recognized, they cannot claim a general lien arising out of any transaction in which the goods or securities are by agreement held for a particular purpose or under special conditions inconsistent with the claim of a general lien.

There

(*a*) 12 *Cl. & Fin.* 787.

1860.  
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Bock
v.
GORRISSSEN.

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 Bock  
v.  
GORRISSSEN.

There is nothing in the general dealings between these two houses to rebut the inference to be drawn from their correspondence about the Mexican Bonds, and that correspondence convinces me that the bonds were to be in the custody of *Hüffel & Co.*, and at the disposal of *Lomer & Co.*, so that, when paid for by *Lomer & Co.*, *Lomer & Co.* should have the power of demanding possession of them when they pleased.

*Lomer & Co.* were speculating in stock which was known to vary rapidly in price from day to day, and it would have been most inconvenient if, after they had paid for the bonds, they could not, upon a great rise in the market, have sold the bonds while there was any liability subsisting in their multifarious and protracted dealings with *Hüffel & Co.* To guard against this peril they stipulate that the bonds should be at their disposal, and should only be retained by *Hüffel & Co.* for safe custody. With regard to the safe custody, the Respondent's counsel rely on the law maxim: "expressio eorum quæ tacite insunt nil operatur." But there are other law maxims more in point: "expressio unius est exclusio alterius," and "expressum facit cessare tacitum." The stipulation that the bonds should be at the disposal of *Lomer & Co.* is direct and positive, and is, I think, quite inconsistent with the notion that *Lomer & Co.* could make no use of the bonds while there was any unsatisfied or unliquidated liability pending under which *Hüffel & Co.* might have a claim against *Lomer & Co.*

I have only further to notice the reliance placed by the Respondent's counsel on *Lomer & Co.*'s letter of the 19th of December, 1857, in which they appear to acquiesce in the refusal of *Hüffel & Co.* to send the bonds to *Hamburg*. It must be recollect that they could not then enter into any fresh contract or vary any existing

ing contract to the prejudice of their creditors. Farther, it is quite clear that this letter was written by them in answer to a representation that by English law the bonds must be considered a deposit with *Huffel & Co.* till *Lomer & Co.* should have fulfilled all their obligations towards *Huffel & Co.*, and the writer of this letter, a merchant at *Hamburg*, ignorant of the law of *England*, for the moment had given faith to this representation.

Mr. *Follett* put in a claim to adduce fresh evidence as to the custom, but leave was reserved to do so only if the Court should think fit. The ratio decidendi on which I proceed being altogether uninfluenced by custom, I must refuse this application, and, reversing the decree appealed from, order that the Defendants deliver up the aforesaid Mexican Bonds to the Plaintiffs and pay the costs of this suit.

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Bock
v.
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M'LACHLAN v. TAITT.

THIS was an appeal from the decision of the Master of the Rolls, reported in Mr. *Beavan's Reports* (a), upon a devise contained in the will of *William Bennett*, the testator in the cause.

By the will in question, dated the 22nd *February*, 1825, the testator devised freehold and leasehold property to trustees upon trust to pay two life annuities and to pay the residue of the rents to his wife *Mary Bennett*

Nov. 23, 26.

Before The
Lord
Chancellor
Lord
CAMPBELL.

Testator gave freehold and leasehold property in trust for his widow for life, with remainder to his niece for life, and on her decease for all and every the child and children of the

for

(a) Vol. 28, p. 407.

niece and for their respective heirs, executors and administrators, as tenants in common, the said children to become beneficially interested on the death of their parent. Held, that the children of the niece took vested interests on their respective births.

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H H

D.F.J.

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v.  
TAITT.

for her life, and immediately after her death upon trust to pay the clear residue of the rents, issues and profits of his said freehold and leasehold estates to his two nieces *Emma Ann Rogers* and *Sarah Gowland* in equal shares during their natural lives for their own sole and separate use and benefit. The testator then gave and devised as follows:—"And if either of them my said nieces shall happen to die without leaving any lawful issue, then upon further trust to pay the whole of the clear residue of the rents and profits of the said estates into the proper hands of the survivor of them my said nieces during her life. But if either of them my said nieces shall happen to die and leave any lawful issue, then upon trust that they my said trustees do and shall stand possessed of and interested in the said freehold and leasehold estates to and for the benefit of all and every the child and children of my said nieces, (that is to say,) one moiety to the children of my said niece *Emma Ann*, and one moiety to the children of my said niece *Sarah* and to their respective heirs, executors and administrators, as tenants in common, the said children to become beneficially interested on the death of their respective parents. But if either of them my said nieces shall die without leaving any lawful issue, then upon trust to convey, assign and assure my said estates to and for the benefit of the child or children of either of my said nieces leaving issue and to their heirs, executors and administrators as tenants in common. But if both of them my said nieces *Emma Ann* and *Sarah* shall die without leaving any lawful issue, or being such all of them shall die under the age of twenty-one years, then upon further trust that they my said trustees do and shall convey, assign, assure or otherwise dispose of my said freehold and leasehold estates unto such person and persons and to such estates, intents and purposes and in such manner and form in all respects as my said wife *Mary Bennett* shall by her last will

will and testament in writing or any codicil thereto, notwithstanding her coverture, direct or appoint, give, devise or bequeath the same."

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**M'LACHLAN**  
v.  
**TAITT.**

In a subsequent part of the will the testator directed as follows:—" And I do hereby declare my will and meaning to be, that in case the issue of either of my said nieces *Emma Ann* and *Sarah* shall be under the age of twenty-one years at the time they become entitled to any estate or interest under this my will, then it shall be lawful for my trustees for the time being to pay and apply the share or shares or presumptive share or shares of the rents, interest and annual produce of my said estate to which the issue of my said nieces may be so entitled, to and for his, her or their maintenance, education and advancement, until he, she or they shall attain the age of twenty-one years."

The testator died on the 23rd *February*, 1825.

The testator's widow died on the 5th *March*, 1843.

On the 15th July, 1825, the testator's niece *Emma Ann Rogers* married *John M'Lachlan*, by whom she had eleven children.

Of these three died in the lifetime of their mother, two of them in infancy and the other after having attained the age of twenty-one.

*Emma Ann M<sup>r</sup>Lachlan died in 1851.*

The Master of the Rolls by the decision appealed from had decided, that upon the true construction of the devise in question and in the events which had happened, the eleven children of *Emma Ann M'Lachlan* obtained

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vested interests at their respective births in her moiety of the property comprised in the above-mentioned devise to the testator's nieces.

Mr. *Lloyd* and Mr. *Mott* appeared in support of the appeal.

Mr. *Selwyn* and Mr. *Prendergast* for the Plaintiffs.

Mr. *Roundell Palmer* and Mr. *Baggallay*, for *John M'Lachlan*, as heir at law and next of kin of his three deceased children, claimed three elevenths of the moiety in question.

Mr. *Lloyd* replied.

The following authorities were referred to : *Howgrave v. Cartier* (a); *In re Williams* (b).

Judgment reserved.

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#### *The LORD CHANCELLOR.*

Nov. 26. At the hearing of this appeal it was confined by the counsel for the Appellant to the construction put by the Master of the Rolls on the first devise in the will of *William Bennett*, by which he devises certain freehold and leasehold lands to trustees, upon trust for the testator's wife for life, remainder for his two nieces *Emma Ann Rogers* (afterwards *Emma Ann M'Lachlan*) and *Sarah Gowland* for their lives, and if either of such nieces should die without leaving issue, upon trust for the survivor for life, and then adds the following limitation:—

(a) 3 *Ves. & Bea.* 79.

(b) 12 *Beav.* 317.

tation:—" But if either of them my said nieces shall happen to die and leave any lawful issue, then upon trust that they my said trustees do and shall stand possessed of and interested in the said freehold and leasehold estates to and for the benefit of all and every the child and children of my said nieces, that is to say, one moiety to the children of my said niece *Emma Ann* and one moiety to the children of my said niece *Sarah*, and to their respective heirs, executors and administrators, as tenants in common, the said children to become beneficially interested on the death of their respective parents."

The testator's niece, *Emma Ann*, died in 1851, having had in all eleven children, of whom eight alone survived her.

Under these circumstances the question arose, whether the eleven children acquired vested interests on their births as tenants in common in remainder, expectant on the death of their mother *Emma Ann*, or whether those children only who survived their mother were entitled to the moiety comprised in this first devise.

Upon this question the Master of the Rolls held that the eleven children acquired vested interests respectively at their births.

There could have been no objection possibly made to this decision, if the limitation had concluded with the words "tenants in common." As a will takes effect at the death of the testator, any devise in favor of persons in esse or to children as a class, without any intimation of a desire to suspend or postpone its operation, confers an immediately vested interest on the persons in esse and  
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M'LACHLAN
v.
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on the children as they come into esse. The law particularly favors the vesting of estates where the devise is to children as a class, considering that before the estates vest in possession, the children or some of them may have died, having been married and leaving children, who otherwise would be unprovided for. The Appellant's counsel relied entirely upon the words which are added, "the said children to become beneficially interested on the death of their respective parents;" but the testator having used language by which the children take a vested interest at their birth, the vesting cannot be postponed to the death of the tenant for life without words clearly indicating such an intention. I agree with the Master of the Rolls in thinking that the words here relied upon merely express, what certainly must be true although the children did take vested estates at their birth, that they would not come into the possession and enjoyment of the property devised till the death of their respective parents. "Beneficially" is not used here in opposition to "contingency," but in the sense of "in possession" as opposed to "in expectancy." The counsel for the Appellant very freely conceded that the language might have this meaning, but insisted that it ought not to have this meaning imputed to it, because then it would only express what otherwise would have been true, and it would have no operation. But it would be very dangerous to lay down a rule that every explanatory phrase in a will, which, in its natural sense, does not alter the operation of the will, must have a non-natural sense imputed to it, on the supposition that the testator must have intended it to alter the meaning of the language he had before employed. It is incumbent on the Appellant to show that the specific meaning of the testator was, that if a child of his niece *Emma Ann* should die before *Emma Ann*, leaving children, these children should not participate in his bounty,

bounty, as they would have done if he had not made this addition to the devise.

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Objection is made that the testator could not mean that the children were to come into possession on the death of their respective parents, because there was a life estate first left to the widow of the testator, and she might have survived the nieces; but the answer seems to me quite satisfactory, that the testator naturally anticipated what actually happened—that the life estate left to his aged widow would expire before the remainder to his younger nieces took effect, and that upon the death of a niece who had been in possession, her children becoming "beneficially interested" would then come into possession.

I think that it would have a mischievous tendency to hold that in this case an exception is to be made to the broad general rule, that upon such a limitation the estate vests at the death of the testator, not at the death of the tenant for life, and I must adjudge that the appeal be dismissed with costs.

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Nov. 22, 26.

Before The  
Lord  
Chancellor  
LORD  
CAMPBELL.

By a post-nuptial settlement, a fund was settled in trust for the husband for life, or until (among other events) he should become an insolvent debtor, with remainder to the wife for life, remainder to their children or issue, as the survivor should appoint, and in default of such appointment, from and after the several deceases of the husband and wife, or the sooner determination of the interests thereinbefore limited to them respectively, in trust for the children then living and the issue of deceased children then living.

The husband's interest ceased

by his insol-

vency, and his wife afterwards died:—*Held*, that the interests of the children and their issue in default of appointment thereupon became vested, and could no longer be varied by the execution by the surviving husband of his power of appointment.

## HASWELL v. HASWELL.

THIS was an appeal from an order made by the Master of the Rolls upon petition presented in the cause, and deciding in effect that a power of appointment vested by post-nuptial settlement in the husband as the survivor of himself and his wife had ceased to be validly exercisable by the husband.

The facts, which are fully stated in the report (a) of the case below, were shortly as follows:—

By the settlement in question, dated 7th September, 1839, a fund, consisting of 4,407*l.* 3*s.* 3*d.* £3 per Cent. Consolidated Bank Annuities, the property of the wife *Elizabeth Haswell* was vested in trustees upon trust to pay the dividends thereof unto or permit the same to be received by the husband *Frederick Thame Haswell* and his assigns, unless and until he should assign, charge or otherwise dispose of the same by way of anticipation, or attempt or agree to do so, or should be duly found and declared bankrupt, or should become an insolvent debtor, or should execute a deed of composition with his creditors, or do some other open act of insolvency, or should do some act whereby the same, if payable to himself, would become vested in some other person or persons by due course of law, or until the death of the husband, which should first happen. And from and immediately after the happening of any one of the events

(a) 28 Beav. 26.

events aforesaid; then upon trust during the life of the wife, in case she should be living at the happening of any one of the aforesaid events, to pay the dividends of the said 4,407*l.* 3*s.* 3*d.* £3 per Cent. Consolidated Bank Annuities as she should, but not by way of anticipation, appoint, and in default of appointment to her for her separate use. And as to the principal of the said 4,407*l.* 3*s.* 3*d.* £3 per Cent. Consolidated Bank Annuities, and the securities whereon the same should be invested, after the determination of the several trusts and interests thereinbefore created, upon trust that the said trustees and trustee should stand possessed of the same respectively in trust for all and every or any one or more of the then present or future child or children, grandchild or grandchildren, or other issue of the husband by the wife (but such grandchildren or other remoter issue to be born before the making of any such appointment in their favor as thereafter mentioned), as the survivor of the husband and wife should, by any deed or deeds, writing or writings, or by will, appoint. And as to the said trust funds and securities, in default of any such appointment, or as to such parts thereof as to which there should not be any such appointment, from and after the several deceases of the husband and wife, or the sooner determination of the interests thereinbefore limited to them respectively, in trust for all and every the then present and future child or children of the husband by the wife, if there should be more than one child who should be then living, and the issue (if any) of any such child or children who should have then departed this life, leaving issue then living (such issue to take only the share which his, her or their parent or parents would have taken if living), equally to be divided among them share and share alike, and if there should be only one such child or issue then living, then the whole to that only child or issue, and the share or shares  
of

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HASWELL  
v.  
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HASWELL.

of such of them as should have attained the age of twenty-one years to be immediately paid and transferred to him, her or them, and the share or shares of such of them as should not then have attained the age of twenty-one years to be immediately paid and transferred to him, her or them on attaining that age, and in the meantime the dividends, interest and annual produce arising or payable for or in respect of such share or shares, or presumptive share or shares, to be applied and disposed of by the trustees for the time being of the said indenture in or towards the maintenance, education or support of such of the said child or children or issue as should not then have attained his, her or their age or respective ages of twenty-one years, during his or her minorities.

The events which had occurred were these:—In 1847, the husband became insolvent, and by a decree of this Court, made in *July*, 1856, in a suit instituted to have the trusts of the settlement carried into execution, it was declared that his estate and interest in the settled fund ceased as from the 19th *April*, 1847, the date of his insolvency, and that the interest of his wife in the settled fund then arose. The wife died on the 24th of *December*, 1858, leaving her husband surviving.

The question was then raised, upon petition presented by such of the eight children of the marriage as were then of age, whether, in the circumstances which had occurred, the power was (on the true construction of the settlement) still subsisting or capable of being exercised by *Frederick Thame Haswell*, or whether, on the other hand, the fund, being presently distributable, the time for the exercise of the power had not then gone by and the power become extinguished.

The Master of the Rolls, by the order appealed from  
dated

dated the 10th *February*, 1860, decided that upon the death of the wife the settled fund became vested in and distributable amongst the children of the marriage, and that those vested interests could no longer be varied by a valid exercise of the power of appointment given to the husband.

*Mr. Selwyn* and *Mr. W. Forster*, for the surviving husband, in support of the appeal.

The words by which the power is given to the husband and wife and the survivor are perfectly general, the object being that they should have an uncontrolled discretion as to the distribution of the fund amongst the children, grandchildren and other issue who should come into esse before the power was exercised. The words "or the sooner determination of the interest therein-before given to them," are relied upon on the other side; but it is submitted that those words are ineffectual to control the clear words of the previous limitation of an absolute discretion given to the survivor of the husband and wife. The power is in gross, and is not destroyed by the determination of the interest of the donee, and, being general in its terms, the whole period of the life of the donee will be allowed for its execution; *Coleman v. Seymour* (*a*); *Parsons v. Parsons* (*b*); *Sugden on Powers* (*c*).

*Mr. T. H. Haddan* (with whom was *Mr. Roundell Palmer*) for the children of the marriage in support of the order at the Rolls.

At the death of the wife the interests before limited terminated, and no appointment having been then made, the interests limited to the children in default of appointment

(*a*) 1 *Ves.* 209.

(*c*) *Vol. 1, page 330, 7th edit.*

(*b*) 9 *Mod.* 484.

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HASWELL
v.
HASWELL.

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 v.  
 HASWELL

pointment became vested, and not only vested but immediately payable to such of them as had then attained the age of twenty-one. The present case is clearly distinguishable from *Parsons v. Parsons* (*a*), in which the words, "or the sooner determination of the interests before given," did not occur. Those words clearly show that a continuance of the interests before given was intended to be of the essence of the power given to the survivor.

He cited *Lancashire v. Lancashire* (*b*).

Mr. N. Lindley for grandchildren.

Mr. G. L. Russell for the trustees of the settlement.

[*The LORD CHANCELLOR.* The difficulty in Mr. Selwyn's construction is, that it is impossible to say what is to be done with the fund in the interval between the death of the wife and an appointment by the surviving husband. It may reasonably be supposed that, if the power was to last after the prior interests should have ceased, the settlement would have contained some provision as to how the trustees were to apply the fund in the interval between the determination of such interests and the exercise of the power.]

Mr. Selwyn in reply.

The settlement, upon the construction contended for, imposes upon the surviving husband the duty of seeing to the application of the fund in the manner most advantageous to the family. This could be done by his executing from time to time an appointment of the whole or

(*a*) 9 Mod. 464.

(*b*) 2 Ph. 657.

or part of the fund, which, if he pleased, he might make revocable, and thus direct the income to be paid before his death, and the capital afterwards, in the manner most suitable to the exigencies of the family; or, if the husband delayed the exercise of his power, the trustees might accumulate the income in the interval. There would be nothing unlawful in such a proceeding.

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HASWELL
v.
HASWELL.

Judgment reserved.

The LORD CHANCELLOR.

I am of opinion that there is no ground for this appeal. The Appellant's counsel admitted that they could not now impeach the decree of *July*, 1856, by which it was declared that the husband's interest in the settled fund ceased in 1847 upon his insolvency, and I have only to consider the decretal order of the 10th of *February*, 1860, declaring that the husband's power of appointment has ceased, and that, on the death of the wife, the fund became divisible among the children and grandchildren as in default of appointment. I quite agree to the position that the husband's power of appointment was not extinguished on his insolvency. It was a power in gross and might have been exercised at any time, not only while his own interest continued, but while the interest of the wife continued. *Parsons v. Parsons* (*a*), has always been held good authority for this doctrine. But in this settlement, although the power of appointment by deed or will is given to the husband and wife or the survivor of them, I think there is a clear indication that this power was to be exercised while the interest of the

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(*a*) 9 *Mod.* 464.

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the husband or of the wife continued. The interest of the children and grandchildren was to vest on the deaths of the husband and wife "or the sooner determination of the interests hereinbefore limited to them respectively." This was to be in default of appointment, but of appointment before the interests before limited had ceased. Upon the construction contended for by the Appellant, no satisfactory answer could be given to the question "what was to become of the fund between the death of the wife and an appointment to be afterwards made by the husband?" One suggestion was, that the fund should accumulate, but, although such an accumulation would not be in contravention of the *Thellusson Act*, it is impossible to suppose that any such accumulation was in the contemplation of the parties to the deed. Then it was said that it would be the duty of the husband to exercise his power of appointment immediately on the death of the wife, but how was he to be compelled to perform this duty? The interest of the husband being forfeited, and the wife being dead, what can the trustees do but divide the fund among the children and grandchildren, as in default of appointment? It might well have been contemplated that the husband would execute his power of appointment in the lifetime of the wife, although his interest had ceased, and in the settlement there is no provision upon his failing to do so, except that the children and grandchildren should immediately take as in default of appointment.

Therefore the appeal must be dismissed with costs.

1860.

DAVIS v. SNELL.

THIS was an appeal from an order of the Master of the Rolls, allowing a demurrer to the Plaintiff's bill.

Nov. 26.
Before The
Lord
Chancellor
Lord
CAMPBELL.

The bill stated in substance that *John Snell* became under a decree in a suit of *Davis v. Chanter*, dated the 10th *April*, 1848, liable to pay certain costs to the present Plaintiff and others; and that, by an order dated the 10th *December*, 1858, and made in the same suit, *John Snell* was ordered to pay 505*l. 15s. 2d.*, the amount of such costs, into Court. That *John Snell*, having failed to obey the last-mentioned order, an attachment was issued against him, but that before such attachment could be executed, he, on the 3rd *May*, 1859, obtained from the Court for Relief of Insolvent Debtors an order for protection under the statutes 5 & 6 *Vict.* c. 116, and 7 & 8 *Vict.* c. 96, and appointing the Defendant *John Daw* official assignee; but that no creditors' assignee had been appointed. The bill further stated, that between the 10th *December*, 1858, and the date of the Defendant *Snell's* petition to the Insolvent Debtors Court, the Plaintiff discovered that *John Snell*, on the 16th *May*, 1848, executed an assignment of all his property and effects, with trifling exceptions, to the Defendants *W. H. Snell* and *Frederick Snell*, whereby, being then in insolvent circumstances, he denuded himself of all means of paying and discharging his debts and liabilities; that on the 10th *December*, 1859, the Plaintiff applied to the Defendant *John Daw*, as the assignee of *John Snell*, to take proceedings in this Court, for the purpose of having the assignment of the

Bill by one of the creditors of an insolvent to recover property alleged to belong to the insolvent's estate, on the mere allegation that the assignee in insolvency refused to sue without an indemnity against the costs of the suit, and that the Plaintiff, through poverty, was unable to give such indemnity: Held, demurrable.

16th

1860.

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 v.  
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16th *May*, 1848, set aside, as having been executed "to the end, purpose and intent to delay, hinder and defraud the creditors under the decree of the 10th of *April*, 1848, from having the benefit of the same;" but that *Daw* declined to take such proceedings without being first indemnified by the Plaintiff against any costs to be incurred therein; that the Plaintiff, through poverty, was unable to give such indemnity to *Daw*; and that under the circumstances stated he ought to be permitted to file the bill in this suit in his own name as Plaintiff, and to make *John Daw* a party Defendant thereto.

The bill (which was filed in *March*, 1860, against *John Snell*, *John Daw*, and the trustees of the deed of 16th *May*, 1848) prayed for a declaration that the deed was fraudulent and void as against the Plaintiff and the other creditors of *John Snell* not parties thereto; and for a transfer to the Defendant *John Daw* of the property comprised therein, for the benefit of the Plaintiff and the other creditors of *John Snell*.

To this bill the trustees of the deed of *May*, 1848, demurred for want of equity. The case is reported below in Mr. *Beavan's Reports* (a).

Mr. *Follett* and Mr. *C. Hall*, in support of the demurrer.

A creditor of an insolvent under the Insolvent Debtors Acts cannot be allowed to sue respecting property alleged to have belonged to the insolvent, and to be vested in his assignee, upon the mere allegation that the assignee declines to sue unless indemnified by and against the costs of suit, and that the insolvent through poverty cannot

(a) *Vol. 28, p. 321.*

cannot give such indemnity. If one creditor might do so, why not another? The whole of the insolvent's property is vested in the assignee for the benefit of all the creditors, and he alone is the party to sue. If he improperly refuses, recourse should be had to the Court for the Relief of Insolvent Debtors to have him removed or to get another assignee appointed. That Court alone is to judge of the propriety of proceedings being taken, and for that purpose it will have regard to what is best for the general body of the creditors. The discretion cannot be assumed by a creditor. The bill does not allege that any application has been made to the Insolvent Debtors Court; *Heath v. Chadwick* (*a*).

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v.
SNELL.

Mr. Elderton in support of the bill.

This case is distinguishable from *Heath v. Chadwick* (*a*), in which case the bill was filed by the Plaintiff on behalf of himself and all other the creditors of the insolvent, except some who were made Defendants, and not as in this case on the Plaintiff's own behalf alone. It is a rule of the Court for the Relief of Insolvent Debtors to require that an indemnity against costs should be given to the assignee before he institutes a suit at the suggestion of a creditor. That Court would neither remove him nor appoint another assignee, on the ground that he refuses to proceed without such indemnity. Unless, therefore, the Plaintiff is allowed to sue in his own name he is entirely without remedy.

The LORD CHANCELLOR.

The case of *Heath v. Chadwick* (*a*) seems to me to govern this case.

The appeal must be dismissed.

(*a*) 2 Ph. 649.

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I I

D.F.J.

1860.

*Nov. 24.
Dec. 4.*

Before *The
Lord
Chancellor
LORD
CAMPBELL.*

An insolvent in 1849 took the benefit of the 1 & 2 Vict. c. 110, and a judgment was entered up against him, pursuant to the provisions of that act. After his death a bill was filed by a creditor, who was also the assignee under the insolvency, to administer the assets of the insolvent. Held, that the bill was not demurrable on the ground merely, that it did not allege either danger to the assets of the deceased, or that application had been made for the sanction of the Insolvent Debtors Court to the suit.

GALSWORTHY v. DURRANT.

THIS was an appeal from an order of the Master of the Rolls overruling a demurrer to the Plaintiff's bill.

The bill was filed by the Plaintiff *Galsworthy* on behalf of himself and all other the unsatisfied creditors of *George Smith* deceased who should come in and contribute to the costs of the suit, against the Defendant *Durrant*, the executor of *Smith*.

The statements of the bill were to the effect following:—

On the 18th of January, 1850, *George Smith* was discharged under the Insolvent Debtors Act (1 & 2 Vict. c. 110), having previously complied with all the provisions of the act, and his estate was vested in the Plaintiff, who had been appointed assignee on the 31st December, 1849. He had previously executed a warrant of attorney to enter up judgment against him in the Queen's Bench for 4,032*l.* at the suit of the provisional assignee, his successors and assigns, for the purpose of securing the amount due from him to his creditors at the time of his insolvency, and judgment was, on the 7th April, 1859, duly entered up on the warrant of attorney.

The insolvent was, at the time of his discharge and thenceforth until his decease, indebted to the Plaintiff in the sum of 1,500*l.* or thereabouts, for which amount the Plaintiff's name was inserted in the schedule.

The insolvent subsequently to his discharge acquired considerable

considerable property. He died on the 24th *April*, 1859, having by his will, dated the 23rd *April*, 1859, appointed the Defendant *Charles Durrant* his executor, who, on the 16th *August*, 1859, proved the will. The prayer was for a declaration that the surplus assets of the testator, which might remain after payment of his funeral and testamentary expenses and of any debts which he might have incurred since his insolvency, were applicable to the payment of the debts due from him to the Plaintiff and his other creditors at the time of his insolvency, and for the usual administration accounts.

Mr. *Selwyn* and Mr. *G. Jessel*, in support of the demurrer.

The question upon this appeal is, whether a creditor under an insolvency can file a bill for an account of the assets of the deceased insolvent, without the consent or direction of the Insolvent Debtors Court first had and obtained pursuant to the provisions of the statute 1 & 2 Vict. c. 110. The 87th section of that statute directs the insolvent to execute a warrant of attorney, upon which judgment is to be entered up, and then proceeds thus :—

“ And if at any time it shall appear to the satisfaction of the said Court that such prisoner is of ability to pay such debts or any part thereof, or that he is dead, leaving assets for that purpose, the said Court may permit execution to be taken out upon such judgment, for such sum of money as under all the circumstances of the case the said Court shall order, such sum to be distributed rateably amongst the creditors of such prisoner according to the mode hereinbefore directed in the case of a dividend made after adjudication ; and such further proceedings shall and may be had upon such judgment as may seem fit to the discretion of the said Court from time to time, until the whole of the debts

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v.  
DURRANT. due to the several persons against whom such discharge shall have been obtained shall be fully paid and satisfied, together with such costs as the said Court shall think fit to award."

And the 91st section of the same statute provides:—  
“That after any person shall have become entitled to the benefit of this act by any such adjudication as aforesaid, no writ of fieri facias or elegit shall issue on any judgment obtained against such prisoner for any debt or sum of money with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof except upon the judgment entered up against such prisoner according to this act; and that if any suit or action shall be brought or any scire facias be issued against any such person, his heirs, executors or administrators, for any such debt or sum of money,” &c., &c., “except as aforesaid, it shall be lawful for such person, his heirs, executors or administrators, to plead generally that such person was duly discharged according to this act by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially.”

Any proceeding against the insolvent or his estate, except by the direction of the Insolvent Debtors Court, is thus absolutely prohibited. This would be clearly so during the life of the insolvent; and it is submitted that the death of the insolvent cannot have the effect of setting up a *jus tertii*, and of giving to the creditor an independent right of suit.

We do not deny that this Court would have jurisdiction in certain cases, as in cases of apprehended loss, or waste of the estate—but no such case is alleged.

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The Insolvent Debtors Court, in giving permission to sue, is guided by all the facts of the case. It takes also into consideration the circumstances of the insolvent and his family, and is empowered to make a reasonable allowance for their maintenance. There is no such jurisdiction in this Court. The whole course of modern legislation has been to take the discretion of instituting proceedings against the insolvent and his estate away from the creditors, and to confer it on the Insolvent Debtors Court. The cases which were cited below were cases which occurred under the former acts, none of which contain such provisions as those of the 87th and 91st sections of the present act. This suit is in fact an attempt to return upon the steps of the legislature, and to re-assert the discretion of the creditor.

They referred to 52 Geo. 3, c. 165; 53 Geo. 3, c. 102; 54 Geo. 3, c. 23; 7 Geo. 4, c. 57; *Ward v. Painter* (a); *Barton v. Tattersall* (b); *Re Moylan* (c); *Byrne v. Byrne* (d); *Jellis v. Mountford* (e).

*Mr. Roundell Palmer* and *Mr. Hallett* for the Plaintiff.

The objection of want of jurisdiction should have been taken by plea and not by demurrer; *Casborne v. Barsham* (f); *Ocklestone v. Benson* (g). The old acts for the relief of insolvent debtors are in many of their provisions similarly worded to the sections 87 and 91 of the 1 & 2 Vict. c. 110, and by a long course of decisions it has been settled that, notwithstanding those provisions, this Court had concurrent jurisdiction. The ground of those decisions was that the rights of creditors were not

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|------------------------------------------------|------------------------------------|
| (a) 2 <i>Beav.</i> 85; 5 <i>Myl. &amp; Cr.</i> | (d) 2 <i>Dr. &amp; W.</i> 71.      |
| 298.                                           | (e) 4 <i>Barn. &amp; Ald.</i> 256. |
| (b) 1 <i>Russ. &amp; Myl.</i> 237.             | (f) 6 <i>Sim.</i> 317.             |
| (c) 16 <i>Beav.</i> 220.                       | (g) 2 <i>S. &amp; S.</i> 265.      |

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to be curtailed or taken away any further than the language of the acts was effectual for that purpose. The present statute does not, it is submitted, affect the principle of the decision in *Ward v. Painter* (*a*). The Insolvent Debtors Court can, under the present act, only give leave to the creditor to put the judgment under the warrant of attorney in force against the insolvent and his estate. It cannot go further and administer that estate. The power of doing that is solely in this Court; and the object of this suit is not execution upon the judgment, but administration of the estate. This Court alone has power to administer and to adjust the equities as between the different orders of claimants, and in cases similar to the present this Court has always hitherto exercised that discretion. According to well-established principle, an existing jurisdiction is not taken away, except by precise and distinct words; and nothing in the 1 & 2 Vict. c. 110, can be pointed to as destructive of that jurisdiction.

They referred to *Tucker v. Hernaman* (*b*); *Ex parte Barrington* (*c*); *Thomas v. Pinnell* (*d*); 54 Geo. 3, c. 23, s. 14.

Mr. Selwyn in reply.

Under the statute 1 & 2 Vict. c. 110, the power of suing of any creditor in the insolvent's schedule is limited to suits with the permission of the Insolvent Debtors Court. The Plaintiff should not have sued without such permission, especially as he is an officer of that Court. The cases which have occurred under the bankruptcy acts have no application. The objection to the jurisdiction

(*a*) 2 *Beav.* 185; 5 *Myl. & Cr.* 298. 1 *Sm. & G.* 394.

(*b*) 4 *De G., M. & G.* 395; (*c*) 2 *Mont. & Ayr.* 255.

(*d*) 15 *Beav.* 148.

tion need not necessarily be taken by plea—a demurrer will lie.

Judgment reserved.

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The LORD CHANCELLOR.

If the question which is raised in this case upon the jurisdiction of the Court were *res integra*, I should have had some difficulty in deciding it. There is no doubt that this Court had jurisdiction to entertain such a bill for the administration of the estate of an insolvent, and there is no doubt that this jurisdiction can only be taken away by the express words of an act of parliament, or by some legislative enactment inconsistent with the exercise of this jurisdiction. But there seems to me to be some reason for contending that although the statute 1 & 2 Vict. c. 110, relied upon by the Defendant's counsel, contains no words expressly taking away this jurisdiction, it does contain enactments affording a plausible argument that the jurisdiction over the distribution of the estate of an insolvent who has been duly discharged under this statute, and who has executed a warrant of attorney by virtue of which a judgment has been entered up, is confined to the Insolvent Debtors Court. The legislature seems to have contemplated that the administration of the estate of the insolvent, begun in that Court, would be carried on and completed in that Court.

Dec. 4.

By the 87th, 91st and other sections of the act it is enacted, that judgment shall be entered up under the warrant of attorney; that the remedy of the creditor shall be restricted to proceedings on the judgment; that power shall be vested in the Insolvent Court of considering whether the insolvent is of ability to pay debts; that such proceedings shall be had as may seem fit in

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in the discretion of the said Court from time to time until the whole of the debts due to the several persons against whom such discharge shall have been obtained shall have been fully paid and satisfied; that if any suit or action shall be brought against any such person, his heirs, executors or administrators, for any such debt or sum of money, except as aforesaid, it shall be lawful for such person, his heirs, executors or administrators, to plead their discharge under the said act; and that a discretion shall be vested in the Insolvent Court as to the allowance to be made to the insolvent for the support of himself and his family. From such legislation there is some ground for contending that parliament intended the administration of the insolvent's estate to be confined to the new special tribunal created for this purpose.

Although the aid of the Court of Chancery might still have been invoked for realising and protecting the estate of the insolvent (and for such a purpose the jurisdiction of the Court of Chancery would clearly continue), it might have been doubted whether, with a view to the administration of the estate, it would be competent, without the leave of the Insolvent Court, to file a bill for the administration of the estate in the Court of Chancery.

It is admitted that in the Court of Chancery no such discretion is vested, and that the distribution of the property realised must there be governed by different rules. This is a clashing of jurisdictions, which the legislature could hardly have intended, and it seems strange that the rights and advantages of the insolvent should depend upon the tribunal in which his creditors elect to sue.

However, there is a series of decisions upon the Insolvent Acts in force previously to the 1 & 2 Vict. c. 110, holding

holding that the jurisdiction of the Court of Chancery to entertain such a bill as this was not thereby taken away. I confess that I find some difficulty in concurring in the reasoning on which the decisions rest, particularly when I find it has been decided by the very distinguished Judge from whose decree this appeal comes, that the creditor of an insolvent discharged under the act has no remedy in equity if there has not been a judgment entered up according to the statute, and that the only remedy of the creditor is upon the judgment.

But to these decisions I must respectfully bow, and I at once said during the argument, that I should consider myself bound by them unless the most recent act, 1 & 2 Vict. c. 110, can be shown to contain some new enactment to oust the jurisdiction of the Court of Chancery. The counsel for the Appellant undertook to show such new enactment, but in this I think they have failed. The clauses of the new act are differently worded and arranged from the 53 Geo. 3, c. 102, and the previous acts. But they seem to me to be substantially the same; for this purpose requiring a recognizance or a judgment, forbidding proceedings upon it without leave of the Insolvent Court, and vesting a discretion in the Insolvent Court as to the administration of the estate, which could not be exercised in the Court of Chancery.

Therefore, the chief argument of the Appellant's counsel would have applied with almost equal force against the decisions relied upon by the counsel for the Respondent.

I must express a hope that in the contemplated new legislation on this subject care will be taken distinctly to define the boundary between the jurisdiction of the Court of Chancery and any special tribunal which may be constituted

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constituted for the distribution of the estates of bankrupts and insolvents.

In the meantime, with some regret, I feel myself compelled to decide against this demurrer and to order the appeal to be dismissed with costs.

Nov. 17, 24.  
 Dec. 10.

Before The  
 LORDS JUS-  
 TICES.

Disposition by a codicil of "all my real and personal estate and effects" held, on the context, not to include a fund of personal estate specifically disposed of by the will.

A testator bequeathed a fund to his nephews and nieces who should be living at his death, and directed that, in case of the death of any of them before receiving their respective shares, the share or shares of them, her or

him so dying should go to the survivors: Held, by Vice-Chancellor *Kindersley*, that the share of a niece was divested by her death within a year after the testator's death; but per the Lord Justice *Turner*, scumble, an inquiry ought to have been directed at what time the fund could have been paid over.

#### In re ARROWSMITH'S TRUSTS.

THIS was an appeal from an order of Vice-Chancellor *Kindersley*, who decided, that on the construction of the will and codicil of *William Arrowsmith* a gift to nephews and nieces vested indefeasibly in those who were living at the expiration of a year from the testator's death, and was not divested by their death during the life of the testator's widow.

The testator by his will dated the 17th of *January*, 1838, after confirming his marriage settlement and making a specific gift to his wife, bequeathed to trustees all his ready money and money out on security that should be due to him at his decease, upon trust to get it in, and pay to *William Blackshaw* and *Elizabeth Buckley* 5*l.* each, if they should be then living, and pay, distribute and divide the remainder "unto and between all my nephews and nieces who shall be then living share and share alike. And in case of the death of any of my nephews and nieces before receiving their respective shares, then the share or shares of them, her or him so dying

held, by Vice-Chancellor *Kindersley*, that the share of a niece was divested by her death within a year after the testator's death; but per the Lord Justice *Turner*, scumble, an inquiry ought to have been directed at what time the fund could have been paid over.

dying shall go and be paid to and amongst all my surviving nephews and nieces share and share alike."

The testator then, from and after the death of his wife, gave all his remaining property (including some property in which his wife had a life interest under the settlement, and a fund which he had previously devised to her for life) to trustees upon trust to sell and to divide the proceeds among all his said several nephews and nieces who should be then living.

The testator, by a codicil dated the 3rd of *September*, 1841, made the following dispositions:—"And I do hereby give and bequeath unto my niece *Elizabeth Buckley* the sum of *30l.*, in addition to her legacy bequeathed in my said will; and I also give and bequeath unto *William Blackshaw* the sum of *20l.*, in addition to his legacy mentioned in the said will. And I give to his wife *Hannah Blackshaw* a suit of mourning at my decease, which I empower my executors to buy for her, and to give to her out of my personal effects. I give to my goddaughter *Frances Buckley* my mahogany dresser and shelves at the decease of my wife *Hannah Arrowsmith*. And I do hereby give and bequeath unto my dear wife *Hannah Arrowsmith* all my real and personal estate and effects, of what nature or kind soever and wheresoever, which I shall be possessed of or entitled to at the time of my decease, to hold, use, occupy, possess and enjoy the same during the term of her natural life; and I do hereby declare this present writing shall be annexed to my will and taken as a part thereof; and I do hereby confirm my said will in all respects whereby the same is not hereby altered or revoked."

The testator died in *May*, 1842, and his widow in  
1858.

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ARROW-  
SMITH'S  
TRUST.

1858. She received during her life the income of the ready money and monies out on security, it being assumed that the codicil gave her a life interest in them. Upon her death, those monies were paid into Court under the Trustee Relief Act.

Of the testator's nephews and nieces who were living at his death one, *Jane Hartnell*, whose representative was *Ada Hartnell*, died in *February, 1843*, and several others died in the lifetime of the widow, but more than a twelve-month after the testator's death. Those who survived the widow presented a petition for payment to them of the whole fund.

Vice-Chancellor *Kindersley* decided that the codicil did not give the widow a life interest in these monies, and that all the nephews and nieces living at the death of the testator took vested interests liable to be divested only on death before the expiration of twelve months from the testator's death; that being the period for which an executor is entitled to postpone payment of a legacy. Some of the surviving nephews and nieces appealed from this decision.

*Mr. W. D. Lewis* and *Mr. Ince*, for the Appellants.

The cases lay down, that where a legacy is given over on the death of the legatee before it is received, that means on his death, before he has acquired a present right to receive; *Re Dodgson's Trust* (a); *Whiting v. Force* (b); *Bernard v. Montague* (c); *Law v. Thompson* (d); *Cort v. Winder* (e). Here the codicil gives a life estate to the widow in this fund, for if it does not, the disposition is nugatory, since the will already gave her

(a) 1 *Drew.* 440.  
(b) 2 *Beav.* 571.  
(c) 1 *Mer.* 422.

(d) 4 *Russ.* 92.  
(e) 1 *Coll.* 320.

her a life estate in everything else; *Blackwell v. Bull* (*a*). It is not necessary that the partial revocation by the codicil should be equally clear with the disposition in the will, it is enough if it is reasonably clear; *Randfield v. Randfield* (*b*); *Duffield v. Duffield* (*c*); *Cookson v. Hancock* (*d*). It being, therefore, impossible that the nephews and nieces should receive their shares of this fund till the death of the widow, the shares of all such of them as died before her are divested in favor of those who survived her.

Mr. *Waller*, for a person to whom a charge was given by the will on the share of one the nephews, urged that his client was in any view entitled to the benefit of the charge.

He referred to *Wigg v. Wigg* (*e*); *Hills v. Wirley* (*f*); *Oke v. Heath* (*g*).

Mr. *John Pearson*, for the representative of one of the nephews who died in the lifetime of the widow.

I contend that the widow did not take a life interest in this fund. The fair construction is, that the codicil intended only to show that the widow was to take a life interest in the residue, which, by the will, was not expressly disposed of during her life; *Doe v. Brasier* (*h*); *Davenport v. Coltman* (*i*). The legacies in the codicil show that it was not intended to give the wife a life interest in the whole estate. But suppose it was so intended, it is not a necessary consequence that the time of vesting indefeasibly is to be altered. Under the will, a legatee who survived the testator twelve months would clearly

(*a*) 1 *Keen*, 176.

(*f*) 2 *Atk.* 605.

(*b*) 8 *H. of L. Cas.* 225.

(*g*) 1 *Ves. sen.* 135.

(*c*) 3 *Bligh, N. S.* 261.

(*h*) 5 *B. & Ald.* 64.

(*d*) 1 *Keen*, 817; 2 *M. & C.* 606.

(*i*) 9 *M. & W.* 481; 12 *Sim.*

(*e*) 1 *Atk.* 382.

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Re  
A know-  
SMITH's  
TRUST.

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Re  
ARROW-  
SMITH'S  
TRUST.

clearly take an indefeasibly vested interest, and there is no reason why the interposition of a life estate should alter this, the purpose being merely to give the widow a benefit, which purpose is satisfied without interfering with the vesting of the shares as determined by the will; *Doe v. Hole* (a). A codicil is, for many purposes, treated as part of the will, but not for such a purpose as this; *Bonner v. Bonner* (b); *Hall v. Severne* (c).

Mr. *Lewin* for other parties in the same interest.

Mr. *H. R. Young* for the executor.

*Ada Hartnell* was served with the petition but did not appear.

Mr. *Lewis* in reply.

Judgment reserved.

*The LORD JUSTICE KNIGHT BRUCE.*

Dec. 10. I think that this case is reasonably clear and plain, subject only to the possible right of Miss *Ada Hartnell*, as to whom I understand that she has been served, but declines to appear, and as to whose claim I desire to give no opinion. It appears to me, that in all other respects the decision of the learned Vice-Chancellor is perfectly correct.

*The LORD JUSTICE TURNER*, after stating the facts of the case, said:—

There are two questions in this case, firstly, whether the eleven nephews and nieces who died in the widow's lifetime,

(a) 15 *Jur.* 13.

(c) 9 *Sim.* 515.

(b) 13 *Ves.* 379.

lifetime, but more than a year after the testator's death, became indefeasibly entitled to shares; and, secondly, whether the niece who died within a year from the testator's death became so entitled.

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SMITH'S  
TRUST.

On the first point, it was argued, on behalf of the Appellants, that the codicil gave the widow a life interest in all the testator's property, including the monies out on security, which were specifically bequeathed by the will, that, therefore, the nephews and nieces could not receive their shares during her life, and that consequently the shares of those who died in her lifetime went over to the survivors. This depends on the question, whether, under the codicil, the widow took a life interest in the specifically bequeathed funds, and I am of opinion that she did not. The codicil gives legacies payable immediately, one of them in terms made payable on the testator's death; it is manifest, therefore, that the life interest of the widow was not intended to affect the whole of the testator's property. This shows that the words of the codicil were not intended to bear the most extended construction, and obliges the Court to consider what is their reasonable construction, and I think there cannot be any doubt what the testator intended. He had by his will made a gift of the residue after the death of his wife, but there was no gift to her, except by implication, and the reasonable view appears to me to be, that he intended, by his codicil, to remove the uncertainty which this might occasion, and to give her an express life estate in the residue.

I am of opinion, therefore, that the foundation of the Appellants' argument on this point fails, and that the eleven nephews and nieces obtained indefeasibly vested interests.

As

1860.

Re  
ARROW-  
SMITH'S  
TRUST.

As to the share of *Jane Hartnell*, who died shortly after the testator's death, it makes very little difference to the other claimants, whether her representative receives a share or not, and it has been agreed that she shall receive it. It therefore becomes unnecessary to express an opinion as to her title, but if it were necessary to give an opinion upon that point, I should be disposed to think that the order of the Vice-Chancellor should be modified by directing an inquiry, whether any part of the fund was received, and could properly, having regard to the state of the assets, have been paid over within the year. The executors, according to the general rule, might have paid it, but the Vice-Chancellor's decision, that the gift over takes effect on death within the year, would prevent their making any payment within that period. I agree with the Vice-Chancellor, that the shares did not vest indefeasibly on the testator's death, and I do so on the following grounds. The expression "die before receiving their respective shares," can only apply to nephews and nieces who were pointed out as objects of gift, but the gift is, in express terms, confined to nephews and nieces living at the testator's death. He therefore, when he speaks of their dying before they receive their shares, cannot have been contemplating their dying in his lifetime. There are two periods to which the words may refer, the period when the fund was actually got in, or the period when it could have been paid over to the legatees. To refer them to the former period would be a most inconvenient construction, and I am, therefore, disposed to think, that if it were necessary to decide the question, the proper course would be to direct an inquiry when the specifically bequeathed monies could have been paid to the legatees.

1860.

## EVANS v. CARRINGTON.

*Nov. 12, 13, 14.  
Dec. 10.*

THIS was an appeal from the decree of Vice-Chancellor *Wood* dismissing the Plaintiff's bill, filed for the purpose of having a marriage settlement and deed of separation set aside, on the ground (among others) that a dissolution of the marriage had been decreed by reason of the adultery of the wife.

By the settlement in question, dated the 12th of November, 1850, and made on the marriage of the Plaintiff with the Defendant *Mary Sophia Carrington*, the Plaintiff appointed a jointure of 500*l.* a year, charged on real estate, to the Defendant if she should survive him; and covenanted that any future acquired property of the Defendant, amounting to 200*l.* or upwards, should be settled upon trust for the husband and wife successively for life; with remainder upon trust for the issue of the marriage; and, in default of children, upon trust for the wife absolutely if she were the survivor; and as she should by will appoint in case she should die in the Plaintiff's lifetime.

The marriage was solemnized on the 14th of November, 1850, a sum of 1,000*l.* £3 per Cent. Consols having been previously transferred by the lady's father into the name of the Plaintiff, as her marriage portion.

There had been no issue of the marriage.

Before The  
*Lord*  
*Chancellor*  
*LORD*  
*CAMPBELL.*

Non-disclosure  
of antenuptial  
incontinence  
on the part of  
a wife held not  
to be such a  
fraud upon the  
husband as to  
entitle him to  
set aside a set-  
tlement made  
upon the mar-  
riage.

But, *semel*,  
that adultery,  
committed be-  
fore separation,  
will invalidate  
a separation  
deed.

The Court of  
Chancery has  
no jurisdiction  
to deprive an  
adulteress,  
whose mar-  
riage has been  
dissolved, of  
any benefit  
under the set-  
tlement made  
upon the mar-  
riage.

The circum-  
stance of a wife  
having induced  
her husband to  
execute a deed  
of separation,  
in contemn-  
ation of a re-

*newal of the illicit intercourse, held sufficient to invalidate the deed.*

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v.

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Very shortly after the marriage the Plaintiff saw reason to believe that he did not possess the affections of his wife; and on the 21st of *March*, 1851, the Defendant left him and refused any longer to cohabit with him as his wife.

It was shortly afterwards arranged and agreed between the Plaintiff and his wife's father, that the Plaintiff and his wife should continue to live separate; and as part of such arrangement a separation deed was executed, dated the 10th *May*, 1851, between and by the Plaintiff of the first part, his wife of the second part, and her father *J. W. Carrington* of the third part, whereby the Plaintiff granted to the said *J. W. Carrington*, in trust for the said *Mary Sophia Evans* during the joint lives of herself and the Plaintiff, an annuity of 250*l.* a year, to be increased on certain contingencies to 350*l.*, and secured upon the life interest of the Plaintiff in certain property to which the Plaintiff was entitled under his uncle's will; and the Plaintiff covenanted that all future acquisitions of real or personal estate which should devolve upon his wife should be for her separate use. The deed then contained, on the part of *J. W. Carrington* the trustee, a covenant that the said *Mary Sophia Evans* should not molest the Plaintiff or attempt to compel him to cohabit with her, and that during the said separation the Plaintiff should not be obliged to pay for the maintenance, support, lodging or wearing apparel of his wife, or for any expense connected with her living, or to pay any debts already contracted by her, or which might be contracted during the separation by her, or in reference to her maintenance or living; and the trustee covenanted to indemnify the Plaintiff against the maintaining, supporting, lodging, clothing and living of his wife during separation, and against all such debts and liabilities as aforesaid, and against all losses and claims in respect of the

the living of the said *Mary Sophia Evans*, or such debts or liabilities, or in anywise relating thereto. And it was declared that the provisions of the deed were to cease in case Mrs. *Evans* should prosecute any suit against the Plaintiff for alimony or maintenance, and that the deed was to be without prejudice to the jointure secured by the marriage settlement.

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In 1854, the Plaintiff brought an action of crim. con. against *Robinson*, which resulted, on the first trial, in a verdict for the Defendant, but on a new trial the Plaintiff obtained a verdict with 500*l.* damages.

In *February*, 1858, the Plaintiff commenced a suit in the Court for Divorce and Matrimonial Causes for dissolution of marriage on the ground of the alleged adultery of his wife with *Robinson*, which resulted in a verdict for the Plaintiff on the issues raised, and in a decree, pronounced in *January*, 1859, of dissolution of the marriage, with costs to be paid by *Robinson* the co-Respondent.

The Court, however, at the hearing of the suit, declined to accede to an application for relief in respect of the settlement and separation deed, on the ground that such relief was not within the scope of its jurisdiction.

At the date of this decree, the Divorce Act in force was the 20 & 21 Vict. c. 85, the Amending Act, 22 & 23 Vict. c. 61, not having been passed until the 13th *August*, 1859.

The Plaintiff paid the annuity under the separation deed up to and inclusive of the half-yearly day or payment immediately preceding the decree of divorce, after which he declined to make any further payments.

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On the 20th *October*, 1859, the trustee of the deed of separation brought an action against the Plaintiff for subsequent arrears of the said annuity, whereupon the Plaintiff instituted the present suit, against *Mary Sophia Carrington*, "otherwise and generally calling herself and known as *Mary Sophia Evans*, the late wife of the Plaintiff," and the respective trustees of the deeds of settlement and separation, which, after setting forth the facts above mentioned, contained the following statement:—

"The said marriage between the Plaintiff and the said Defendant *Mary Sophia Carrington*, otherwise *Evans*, as well as the said indenture of settlement of the 12th day of *November*, 1850, were procured by fraud and collusion on behalf of the said Defendant *Mary Sophia Carrington*, otherwise *Evans*, who previously to her aforesaid marriage with the Plaintiff had, unknown to the Plaintiff, committed fornication with the said *Robert Ansley Robinson*, and the connection which had been so as aforesaid formed between the said *Robert Ansley Robinson* and the said *Mary Sophia Carrington*, otherwise *Evans*, previously to her said marriage with the Plaintiff, was, unknown to the Plaintiff, renewed after the said marriage; and the Defendant *Mary Sophia Carrington*, otherwise *Evans*, in fact and as aforesaid left the Plaintiff and refused to cohabit with him previously to the date and execution of the said indenture of the 10th *May*, 1851, and in order that she might more readily have adulterous intercourse with the said *Robert Ansley Robinson*; and the said Defendant *Mary Sophia Carrington*, otherwise *Evans*, also fraudulently procured the Plaintiff to execute the said indenture of the 10th *May*, 1851, for the purpose of more securely carrying on her said adulterous intercourse with the said *Robert Ansley Robinson*; and, as evidence hereof, the Plaintiff

Plaintiff charges, that it was fully proved, as well upon the second trial of the said action for criminal conversation against the said *Robert Ansley Robinson* as upon the aforesaid trial of the said issues in the said Court for Divorce and Matrimonial Causes, that the said Defendant *Mary Sophia Carrington*, otherwise *Evans*, had committed fornication with the said *Robert Ansley Robinson* previously to her marriage with the Plaintiff. At the time the Plaintiff so as aforesaid married the said Defendant *Mary Sophia Carrington*, otherwise *Evans*, he was wholly ignorant of any fornication or other improper intercourse having taken place between the said Defendant *Mary Sophia Carrington*, otherwise *Evans*, and the said *Robert Ansley Robinson*, or any person; and the Plaintiff was induced, by the said Defendant *Mary Sophia Carrington*, otherwise *Evans*, to believe, and he verily believed, at the time of such marriage, and also thenceforth up to the date of the execution of the said indenture of the 10th *May*, 1851, and for some time subsequent thereto, and until he discovered the adultery aforesaid, that the said Defendant *Mary Sophia Carrington*, otherwise *Evans*, was a virgin at the time of her said marriage with the Plaintiff, and of unimpeachable conduct. And the Plaintiff charges, that unless he had fully believed, during his addresses to the said Defendant *Mary Sophia Carrington*, otherwise *Evans*, previously to their said marriage, and at the time of such marriage, that the said Defendant *Mary Sophia Carrington*, otherwise *Evans*, had not pledged her affections to the said *Robert Ansley Robinson* or any other person, and that she was a virgin and of perfectly chaste conduct, the Plaintiff would not have married her."

The bill prayed that the settlement and the separation deed, or at least the latter of those deeds, might be delivered

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The bill also prayed that the necessary accounts might be taken, and for an injunction to restrain the further prosecution of the action at law to recover the arrears of the annuity.

To this bill the Defendants *Mary Sophia Carrington* and the trustees demurred for want of equity, and the demurrer was, on the 7th *December*, 1859, allowed by Vice-Chancellor *Wood*, but leave was given to amend the bill by adding an averment of adultery between the marriage and the separation deed.

The bill was accordingly amended by adding allegations to that effect; but, upon the hearing, his Honor was of opinion that these allegations were not established by the evidence, and dismissed the bill (a).

Mr. *Rolt* and Mr. *Hallett*, for the Plaintiff.

Both the marriage settlement and the deed of separation were obtained in furtherance of a fraudulent scheme concocted

(a) See *Evans v. Currington*, 1 *John. & H.* 598—610.

coceted for the purpose of facilitating and continuing an immoral intercourse between the Defendant *M. S. Carrington* and her paramour *Robinson*. The evidence shows a continuance of that intercourse, almost uninterruptedly, from a period antecedent to the marriage till long after the execution of the separation deed. The settlement therefore may be set aside on the ground of fraud; *Colombine v. Penhall* (*a*); *Fraser v. Thompson* (*b*); and even at law relief may be had against a fraudulent separation deed; *Evans v. Edmonds* (*c*).

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Next, the adultery of the wife, and the divorce founded upon it, give the Court jurisdiction to deal with the settlement; *Ball v. Montgomery* (*d*); *Carr v. Eastabrooke* (*e*). Upon the true construction of the deed of separation, the intention was that the provisions of that deed were to remain in force only during the coverture. From the time of the decree for dissolution of the marriage for adultery, the liability of the husband under that deed ceased, and it became of no validity whatever, except as to debts prior to that decree. The adultery and divorce together having destroyed the consideration for the separation deed, the Plaintiff ceased to be under any obligation under it to pay his wife's debts and expenses; *Hirst v. Tolson* (*f*); *Mirehouse v. Rennell* (*g*); *Bury v. Allen* (*h*); *Russell v. Smyth* (*i*); *Govier v. Hancock* (*k*); *Devaux v. Conolly* (*l*); *Code Nap., tit. Divorce* (6), ch. 4, ss. 299, 300, 301; 1 *Ersk. Inst.*, bk. 1, tit. 6.

*Sir*

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|--------------------------------------------|-------------------------------------------------------|
| ( <i>a</i> ) 1 <i>Sm. &amp; Giff.</i> 228. | ( <i>g</i> ) 8 <i>Bing.</i> 490.                      |
| ( <i>b</i> ) 1 <i>Giff.</i> 49.            | ( <i>h</i> ) 1 <i>Coll.</i> 589.                      |
| ( <i>c</i> ) 13 <i>C. B.</i> 777.          | ( <i>i</i> ) 9 <i>M. &amp; W.</i> 810; 1 <i>Dowl.</i> |
| ( <i>d</i> ) 2 <i>Ves. jun.</i> 191—196.   | <i>P. C., N. S.</i> 929.                              |
| ( <i>e</i> ) 4 <i>Ves.</i> 146.            | ( <i>k</i> ) 6 <i>T. R.</i> 603.                      |
| ( <i>f</i> ) 2 <i>Mac. &amp; G.</i> 134.   | ( <i>l</i> ) 8 <i>C. B.</i> 640.                      |

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Sir *Hugh Cairns* and Mr. *Freeling*, for the Defendant
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The evidence does not establish fraud in obtaining either the marriage or the separation deed. Whatever power there may be of dealing with the settlement or the separation deed upon the dissolution of the marriage is not, nor ever has been, within the jurisdiction of this Court, but is now vested in the Divorce and Matrimonial Causes Court. The Court cannot set aside the settlement, except on the terms of a *restitutio ad integrum*. The cesser of the consideration given is no ground for such a decree; *Sidney v. Sidney* (a); *Blount v. Winter* (b); *Buchanan v. Buchanan* (c); *Seagrave v. Seagrave* (d); *In re Anne Walker* (e); *Field v. Serres* (f).

The law is, that when once the consideration for a contract has been given the contract cannot be afterwards set aside on the ground of the cesser of the consideration; *Cox v. Barnard* (g); *Jee v. Thurlow* (h); *Campbell v. Ingilby* (i).

Mr. *Brodrick* for the trustees.

Mr. *Rolt* in reply.

Judgment reserved.

The LORD CHANCELLOR.

Dec. 10. I am clearly of opinion that, as far as the marriage settlement is concerned, the decree appealed from ought to

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| (a) 3 <i>P. W.</i> 269. | (f) 1 <i>Bos. & P., N. R.</i> 121. |
| (b) <i>Ibid.</i> 276, n. | (g) 8 <i>Hare</i> , 310. |
| (c) 1 <i>Ball. & B.</i> 203. | (h) 2 <i>B. & C.</i> 547. |
| (d) 13 <i>Ves.</i> 439. | (i) 21 <i>Beav.</i> 567; 1 <i>De G. &</i> |
| (e) <i>Ll. & Co., temp. Sugd.</i> 299. J. 393. | |

to be affirmed. On this part of the case I had made up my mind at the conclusion of the opening of the Appellant's counsel; and if it were not so intimately connected with the deed of separation I should not have required the Respondent's counsel to address me upon it.

This case is not to be decided by the Levitical law, nor by the Code *Napoleon*, nor by any other foreign code referred to, but by the law of *England*, which is explicit and well established upon this subject.

There is no ground for impeaching the marriage settlement on the ground of fraud. Giving credit to the antenuptial incontinence imputed to the lady, it is impossible to say her suppression of her frailty, and the simple fact of her coming into the arms of her husband as if she had been an untouched virgin, would be such a fraud upon him as would have given him a right to set aside the marriage settlement. This course could only be justified by the tyrannical legislation of *Henry VIII.*, making it high treason in any woman not a virgin to conceal her lapse from virtue and to marry the king. Such legislation, down to the present time, when there have been attempts to justify many of the acts of that sovereign, formerly considered very disreputable, has remained, as far as I know, as yet without defence or palliation.

We have no occasion to consider what might be the effect upon a marriage settlement of clear proof that an unchaste woman had conspired with others, by fraudulent misrepresentations, to palm herself on a suitor as a virgin worthy of his choice; for *Robinson* alone is suggested as the conspirator with the lady; and even if his declaration at the *Cheltenham* club about *Evans* being "a slippery fish at last hooked" were admissible in evidence,

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dence, it would be quite insufficient to prove that, in combination with her, he planned and brought about the marriage.

The marriage settlement being valid when executed, the wife, according to our law, did not by adultery lose any benefit which it conferred upon her. This has been the clear understanding of all English lawyers; and if decisions are wanted I need only refer to *Sidney v. Sidney*(a); *Blount v. Winter*(b); *Buchanan v. Buchanan*(c), and *Field v. Serres* (d).

The simple dissolution of marriage for adultery makes no difference. Till very recently this could only be effected by a privilegium, an act of the legislature in the form of a divorce bill. Such bills sometimes contained clauses which had full effect, from the omnipotence of parliament, to vary the provisions of marriage settlements according to what was fit according to the circumstances of particular cases. But in as far as the marriage settlement was not expressly varied by the Divorce Bill the marriage settlement stood firm and might be enforced for the benefit of the divorced wife.

Can it be said that there is a difference as to the effect of a dissolution of the marriage, whether this be brought about legislatively by a privilegium, or judicially under a general law? All the arguments for setting aside the marriage settlement after the divorce à vinculo apply with equal force to both modes of dissolution.

No new power has been conferred on a Court of Equity to interfere with the settlement. By sect. 45 of 20 & 21 Vict.

(a) 3 P. Wms. 269.
(b) *Ibid.* 276, n.

(c) 1 *Ball & B.* 203.
(d) 1 *Bos. & Pul.*, N. R. 121.

Vict. c. 85, it is provided that in any case in which the Court thereby constituted should pronounce a sentence of divorce for the adultery of the wife, if it should be made to appear to the Court that the wife was entitled to any property either in possession or reversion, it should be lawful for the Court, if it should think proper, to order such settlement as it should think reasonable to be made of such property, or any part thereof, for the benefit of the innocent party and of the children of the marriage, or either or any of them.

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When the act of last session, *23 & 24 Vict. c. 144*, was passing through parliament, there was a proposal to extend this power, but no further addition to it could be obtained than that any instrument executed under it pursuant to an order of the Court should be deemed valid, notwithstanding the disability of coverture. Whether in the exercise of this power the Court of Divorce could meddle with the wife's jointure under a marriage settlement we need not here inquire. The legislature certainly has not conferred any such power upon the Court of Chancery. The Court of Chancery, therefore, remains powerless where the marriage has been dissolved by the Divorce Court, as it was where the divorce was by act of parliament. So much for the marriage settlement.

With respect to the deed of separation, although the Vice-Chancellor was equally clear that the suit could not be supported, I find much greater difficulty. I agree with him that this deed cannot be set aside on the ground that the wife is actually proved to have carried on an illicit intercourse with *Robinson* after her marriage, and before the deed was executed. Such proof would have invalidated the deed, for in that case the Plaintiff not being liable for her maintenance when she lived separate from him, he required no indemnity against a claim of this

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this sort, so that there would be no consideration for his promise to pay the annuity; and he, being in ignorance of the adultery, would be considered as having been fraudulently induced to execute the deed. But although the behaviour of the wife was unbecoming and suspicious between the time of her return to *Cheltenham*, when she had quarrelled with her husband at *Leicester*, and the day when the deed was executed, and she may be considered as showing a continuance of her improper attachment to *Robinson*, and a readiness to renew her illicit intercourse with him, I think that no facts are in evidence from which the inference can judicially be drawn that any act of adultery was committed during this interval. Therefore the new allegation of such acts of adultery introduced into the bill on the amendment is unsupported and unavailing.

Nor do I think that the deed of separation, if valid when executed, was invalidated by the subsequent adultery, and the arguments founded upon alleged failure of consideration, and upon the construction of the covenant to pay the annuity, do not seem to me to apply more forcibly to this deed than to the marriage settlement.

But I am of opinion that the deed of separation was fraudulent and void in its inception, on the ground that the wife, having before the marriage had illicit intercourse with *Robinson*, induced the Plaintiff to execute the deed in contemplation of a renewal of that illicit intercourse, and that she might carry it on with more facility. If there be evidence reasonably to support such inferences, I cannot doubt that the deed ought to be set aside. *Evans v. Edmonds* (a), is not an exact authority for

for this position, as here there is no sufficient evidence of an act of adultery having been committed prior to the execution of the deed of separation. But I think that both cases rest upon the same principles of morality, justice and expediency. If the covenant was obtained with such a view, and for such a purpose, will the tribunals of any Christian or of any civilized country assist the wife, when, having carried on the adulterous intercourse which she had contemplated, she seeks to enforce the covenant?

Let me then look to the evidence, which every one at first is induced, if possible, to disbelieve, from the depravity which it discloses. But we find that this unfortunate woman must have been gradually trained on by her seducer in the ways of lasciviousness till she became lost to all sense of decency as well as of purity. So early as *May*, 1845, considerable progress had been made in her degradation. The scene in the garden at *Swynning*, near *Tewkesbury*, was proved by several witnesses of undoubted credit and above all suspicion, when she, being in her twentieth year, permitted Mr. *Robinson*, a married man, whose wife she must have been well acquainted with at *Cheltenham*, to take such indecent liberties with her that Miss *Maxwell*, the lady whom she had been visiting with Mr. *Robinson*, when informed of them, gave orders not to admit her visits to the house in future, and she and Mr. *Robinson* were not received when they again came to this lady's house at *Swynning*. The late wife of the Plaintiff (then Miss *Carrington*, whom for convenience I shall still designate as Mrs. *Evans*) on her oath not only denies these liberties, but denies that there ever was any such meeting at Miss *Maxwell*'s, at *Swynning*, thereby, I am sorry to say, taking away all weight from her denial of the charges of immorality against her.

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I do not enter into the manner in which, before her marriage, she was in the habit of riding out with Mr. *Robinson*, on a horse of his, and walking with him in places little frequented, and going home with him from balls in a cab at *Cheltenham*, which caused much scandal in that town, and ought, in the opinion of Vice-Chancellor *Page Wood*, to have put Mr. *Evans* upon his guard when courting her. Her ante-nuptial illicit intercourse with Mr. *Robinson* in *July*, 1849, is fully established by *Boston*, the flyman, if he is to be believed. He does tell an improbable story, if he were speaking of persons who had any regard to decency, but he is strongly corroborated by disinterested and respectable witnesses; and although there appears to be some mistake about a date, and there is an attempt at an alibi, I must declare my full conviction that what he swears is substantially true. I do not feel myself now at liberty to rely upon the advantage which I enjoyed in having been present when he and the witnesses upon this subject were examined before me *vivâ voce*, and I saw their demeanour. But, confining myself to the written depositions, coupled with the undoubted evidence of the manner in which Mr. *Robinson* and this unhappy female were in the habit of comporting themselves, I think that the illicit intercourse in the fly, spoken to by *Boston*, is satisfactorily established.

I have now to consider what took place between the date of the marriage and the execution of the deed of separation. We know nothing distinctly of the manner in which Mr. and Mrs. *Evans* behaved to each other till they came to *Leicester*. There I can see nothing to blame in the conduct of Mr. *Evans* except his asking her to live in the same house with his mother, contrary to a promise, she says, that he had made to her before marriage. But on her part I discover a strong dislike of her

her husband, an eagerness to quarrel with him and a strong desire to return to *Cheltenham*, where *Robinson* was then living. The manner in which she complained of her lodgings in *Leicester*, and of *Leicester* not being a fit place for a lady like her to live in during the hunting season, the part she took when her maid had so grossly misconducted herself, and the determination she expressed to return to her parents at *Cheltenham*, although her husband, without mentioning *Robinson's* name to her, strongly objected to her residing in that town, lead me to think that a permanent separation from her husband was then in her contemplation. This is strengthened by her conduct from the time she carried into effect her purpose of returning to *Cheltenham* and was separated from her husband. She made her father's house her home, but she seems constantly to have been in *Robinson's* company and under circumstances which, although they do not support a judicial inference of adultery then having been committed between them, excited suspicion and scandal.

Mrs. *Wiggetts*, a respectable lady wholly disinterested, in her affidavit of 23rd *February*, 1860, swears that she was on a visit at *Lansdown Terrace, Cheltenham*, from *December*, 1850, to the 8th of *May* following; that she well remembers that immediately after the separation, and from that time to the 8th of *May*, she constantly met the Defendant Mrs. *Evans* and *Robinson* in the neighbourhood of *Lansdown Terrace* "and several times near *Christchurch*, which is an unfrequented spot in that locality," but which she, the deponent, often had occasion to pass to visit her cousin, and conceiving such conduct to be improper under the circumstances the deponent ceased to recognize them and never afterwards called or visited at the house. The deponent then mentions a particular occasion upon which her aunt, with whom she was then

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then on a visit, "remonstrated with *Robinson* upon his being so constantly seen alone with Mrs. *Evans*, and stated that it had become a public talk, and that if he was a real friend to the family of the *Carringtons* in her opinion he would never pass their threshold again."

Richard Litchfield, esq., a distant connexion of *Robinson*, swears that from 1850 until the action was brought he was residing at *Lansdown Terrace, Cheltenham*, and noticed that the Defendant Mrs. *Evans* and *Robinson* "were frequently together alone walking up and down in front of his house in *Lansdown Terrace* aforesaid, at or about the time of the said separation and from thenceforth until the said action was brought, and deponent then was and now is of opinion that their intimacy was very improper."

W. I. Charlton, esq., of *Lansdown Terrace, Cheltenham*, in his affidavit swears that Mrs. *Evans* and *Robinson* at this time "were frequently walking or riding on horseback together alone in *Lansdown Terrace* and in the neighbourhood of *Cheltenham*, and that Mrs. *Evans* then always rode a black horse, which he believes belonged to *Robinson*."

Edward Mitchell, esq., a gentleman residing at *Cheltenham*, in his affidavit deposes to the like effect (except as to the horse), adding that *Robinson* visited at the house of Mrs. *Evans's* parents almost daily, and frequently twice a day, unless when he happened to be away for some short period; and that the deponent was and is of opinion, from his observation of Mrs. *Evans's* conduct, that it was incorrect, their being out so much alone together, and that there was gross impropriety in the extreme intimacy between them.

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Great stress is laid on an offer made by Mrs. *Evans* to be reconciled to her husband and to live with his mother, but this, I believe, was artfully made in the knowledge that it would be refused. Before this offer there had been an interview, of which Mr. *Evans*, in his affidavit of 13th *December*, 1859, gives the following account : "that on the day which had been previously fixed for discussing the question of his mother's residing with them, he went to the house of his wife's parents at *Cheltenham*, and then had an interview with her and her parents; that at this interview he explained to her parents the difference between himself and his wife as to her objection to his mother residing in the house with them; that his wife's parents appearing to agree with him, the Defendant, Mrs. *Evans*, became much excited and left the room, saying: 'The matter is ended so far as I am concerned,—I have said my say'; that the Plaintiff shortly afterwards left the room, and went to the Defendant in her bedroom, and there reasoned with her, and endeavoured to persuade her to be advised, but she replied her mind was made up, and that I must make her an allowance; whereupon I went home very much shocked and distressed at her conduct. I was satisfied from that time that the said Defendant had no affection whatever for me, and that she was determined, if possible, to live separate from me, though I did not then suspect her of infidelity."

She did write a letter to her husband offering to return and live with his mother, but I believe that she expected, and was much pleased to receive, an answer from him in which he says—"you have brought this all on yourself, *Mary*; to the last moment you persisted in your declaration that you would never come into my house while my mother was in it, except as a visitor. You did not come to this conclusion suddenly, but after the considera-

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tion of more than a month. The meeting at your father's house yesterday was fixed by us both to finally settle the question. You allowed me to leave the house without altering your determination, or giving me the least idea you ever meant to do so. This was your own act and you must be accountable for it. I have always told you if you ever did come to the conclusion of leaving me I would never receive you again into my house, and I never will. In fact I wonder, after the language you used to me yesterday, how you could ever expect or ask such a thing of me. Can I wish to live with you again when you have grossly deceived me,—when you have never ceased to abuse me and misrepresent every thing I have ever done or said since our marriage,—when you have shown yourself utterly heartless, and when I am perfectly aware, from my knowledge of your disposition, that your consent to come and live with me here unconditionally (which seems to be implied, though not directly expressed, in your letter of this morning) does not proceed from any change in your feelings towards me, but only from a wish to avoid unpleasant consequences to yourself?"

Then came immediately the letter of Messrs. *Williams & Griffiths*, the solicitors, requiring Mr. *Evans* to make an allowance to his wife, to enable her to live separate and apart from him.

And who gave Messrs. *Williams & Griffiths* the instructions for the deed of separation? The first item in their bill of costs is in these words and figures:—"Conference with the Hon. *C. Berkley* and Mr. *Robinson* as to a family private affair, 13s. 4d." It was pretended that the Hon. *C. Berkley* was to be a trustee. But, as Vice-Chancellor *Page Wood* observes, "the subsequent correspondence seems to show that he was not thought of as trustee

trustee until a later period." Mr. *Robinson* alone could have been Mrs. *Evans*'s adviser. While the deed was in preparation, it is in evidence that she was constantly walking and riding out with him alone, so as to create much scandal at *Cheltenham*. The Vice-Chancellor observes that it was not unnatural that Mr. *Robinson* should be consulted about the deed of separation, as he was "a married man and a friend of the family." He was the married man and friend of the family who took such indecent liberties with the young girl in the garden near *Tewkesbury* in the year 1845,—who, shortly before the marriage, was seen with her in the fly by *Boston*, —who, while the deed was preparing, was cautioned by decent and respectable people against his familiarity with Mrs. *Evans*, and advised confidentially, for the sake of her reputation, not to go to her father's house, and who, in the year 1853, having taken a house for her in the *Edgware Road*, in *London*, was intrusted by her with a latch key, by which he admitted himself at all hours of the day and night, and carried on an adulterous intercourse with her, proved by the testimony of eye-witnesses. His Honor the Vice-Chancellor appears to me to have been misinformed as to the difficulty of proving the adultery satisfactorily. At the first trial at *Liverpool* of the action for criminal conversation, the jury did find a verdict for the Defendant, I believe from the grossness of the misconduct imputed to Mrs. *Evans* and this jury not being aware of the degree to which she had been gradually debased by her seducer. That verdict was disapproved of by the presiding Judge, and a new trial was granted by the unanimous judgment of the Court of Exchequer. On the second trial the jury found a verdict for the Plaintiff with large damages, and the verdict was confirmed by the Court. At the trial of Mr. *Robinson* for perjury in having denied the adultery, the jury did not all agree upon a verdict, some of them thinking, I believe,

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## CASES IN CHANCERY.

The prosecution for perjury against a man for denying that he had illicit intercourse with a married woman is trifling. But in the suit in the Divorce Court it was proved to the entire satisfaction of the court by Mr. Baron Martin who presided, and that verdict was afterwards approved and acted upon by the court consisting of the Chief Justice of the Queen's Bench, another Judge of that Court and the Judge Chancellor. The acts of adultery on which the sentence of divorce was pronounced proceeded Mrs. *Evans* no longer living.

If there has been direct proof of a renewal of the illicit intercourse between Mrs. *Evans* and *Robinson* immediately after the deed of separation was executed, there is no one who would hesitate to come to the conclusion that Mrs. *Evans* and *Robinson* fraudulently caused Mr. *Evans* to execute it in contemplation of their resuming that intercourse, and with a view that, Mrs. *Evans* being separate from her husband and having a separate maintenance secured to her, she and her paramour might more conveniently carry on that intercourse.

There is no sufficient evidence of the act of adultery being committed while Mrs. *Evans* and *Robinson* remained at *Cheltenham*, nor until her coming to *London* in *June*, 1853, when the adulterous intercourse between them appears to have been habitual. But from *March*, 1850, till *June*, 1853, they continued residing at *Cheltenham* on the intimate and familiar footing which the witnesses described. It was known that Mr. *Evans*'s suspicions had been excited, and that he was trying to obtain evidence of their guilt, and with their experience, if they were so inclined, they might have contrived to indulge their illicit propensities without affording evidence

evidence sufficient legally to convict them. When they left *Cheltenham* and came to *London*, their precautions ceased, and evidence of their guilt was obtained which is altogether overwhelming.

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Now, assuming that there is not evidence to invalidate the deed of separation according to the decision of the Court of Common Pleas in *Evans v. Edmonds* (a), I think there is evidence to invalidate it on the principle which I have stated, that none shall be permitted to take advantage of a deed which they have fraudulently induced another to execute that they may commit an offence against morality to the injury and loss of the party by whom the deed is executed.

As to the claim upon the deed, had it been valid, for the costs of the proceedings in which the Plaintiff has been involved from the misconduct of his wife in breaking her marriage vow, I should have had no difficulty in holding that the covenant in the deed extended only to costs incurred in consequence of the husband's liability to maintain her. But it is unnecessary to say more upon this point, as I am of opinion that the deed of separation must be set aside.

Therefore, affirming the decree as far as the marriage settlement is concerned, I reverse it as to the deed of separation, without costs on either side, either as to the suit in the Court below or as to the appeal. The deposit will be returned to the Appellant.

(a) 13 C. B. 777.



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**THE LIVERPOOL BOROUGH BANK  
v. TURNER.**

*Dec. 7, 8, 12.*

*Before The  
Lord  
Chancellor  
LORD  
CAMPBELL.*

Although the Merchant Shipping Act, 1854, contains no provision negativing the validity of a mortgage made otherwise than according to the terms of the act, the whole scope of the act is to that effect, and an equitable mortgage is still invalid.

**T**HIS was an appeal from the decision of Vice-Chancellor *Wood* dismissing the Plaintiffs' bill so far as it sought relief in respect of an alleged equitable mortgage of certain shares in a ship called the *Italian*.

Towards the close of the year 1855, the ship *Italian* was purchased by a firm of *M'Larty & Co.*, consisting of *Donald M'Larty, jun., John M'Kean and Robert Lamont*, but was registered in the joint names of *Robert Lamont and John M'Kean*, and two other persons, named *John M'Ausland and Archibald Denny*.

The name of *John M'Ausland* was so put upon the register in accordance with the following memorandum of agreement:—

“ Memorandum of agreement between *Tulloch and Denny* and *John M'Ausland*, attorney for *Edward Blackmore*, all of *Dumbarton*, of the first part, and Messrs. *M'Larty & Co.*, of *Liverpool*, of the second part. The thirty-four sixty-fourths of the S.S. *Italian*, built by *Archibald Denny*, belonging to the said first parties, is hereby disposed of to the said second parties for the sum of 12,750*l.*, payable before the ship leaves *Bowling*, as follows:—8,500*l.* cash, 4,250*l.* by bill at six months' date from 1st *November* instant. The said *John M'Ausland* to go on the register as joint owner to secure payment of the said bill, and upon payment thereof to join with other owners on register in conveying the said vessel, or any part thereof, to such persons as the

the said firm of *M'Larty & Co.* shall direct. A formal agreement to be drawn in terms hereof, and signed, if required, by either party.

" Dated at *Dumbarton*, 13th November, 1855."

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The name of *Alexander Denny* was put upon the register in accordance with another memorandum of agreement, dated the 18th of *December*, 1855, and signed by *Alexander Denny*, which was as follows:—

" Memorandum respecting the purchase of the *Italian* S.S. The firm of *M'Larty & Co.*, of *Liverpool*, having purchased thirty sixty-fourth shares of the screw steam-ship *Italian* from *Alexander Denny*, and part of the purchase-money paid for the said shares purchased from the said *Archibald Denny* and *Alexander Denny* being by the following bills, drawn by the said *Archibald Denny* upon and accepted by the said *M'Larty & Co.*, and dated respectively the 17th day of *November*, 1856, that is to say, a bill of exchange for 2,000*l.* payable four months after date, a bill of exchange for 2,000*l.* payable four months after date, a bill of exchange for 2,000*l.* payable four months after date, each of the said three bills being renewable for a further period of four months at *M'Larty & Co.*'s expense, if required by them, a bill of exchange for 1,750*l.* payable six months after date, also renewable for a further period of four months, if required; the said vessel having been registered in the names of *Robert Lamont*, *John M'Kean*, *John M'Ausland* and *Alexander Denny*, as joint owners: It is, in consideration of the premises, agreed and declared that the said *Robert Lamont* and *John M'Kean* are so registered as partners of and on behalf of the said firm of *M'Larty & Co.*, who are to have the sole and entire arrangement of the said vessel, and the profits thereof, as owners; and that the said

*Alexander*

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*Alexander Denny* is so registered as a joint owner merely to secure the payment of the said bills of 2,000*l.*, 2,000*l.*, 2,000*l.* and 1,750*l.*, or any renewal of same in whole or in part; and he hereby agrees, on payment of the said bills respectively, to join with the other owners on the register in conveying the said vessel, or any part or share thereof, to such persons as the said firm of *M'Larty & Co.* shall direct."

In April, 1856, the bank pressed the firm of *M'Larty & Co.* for further security for a balance due to them upon the account of *Robert Lamont*, whereupon *Donald M'Larty, John M'Kean* and *Robert Lamont* signed and gave to the bank the following letter, dated the 30th of April, 1856, on which the question arose:—

" Gentlemen,

" In consideration of your continuing the account of *Robert Lamont*, and making further advances, we agree that we will, whenever required, assign to you, or such persons as you may appoint, all our right, share and interest in the screw steam-ship *Italian*, for the purpose of securing all sums of money in which *Robert Lamont* or *M'Larty & Co.* are now or may at any time or times hereafter become indebted to you on any account or in any manner whatever.

" *Donald M'Larty, jun.*

" *John M'Kean.*

" *Robert Lamont.*"

The bank, upon the faith of this security, continued to discount bills for and to make advances to *Robert Lamont* on his aforesaid account, and at the date of the bankruptcy of the firm of *M'Larty & Co.* there was due and owing to the bank in respect of such account of *Robert Lamont*, and upon the securities aforesaid, the sum of 10,000*l.* and upwards.

In

In September, 1856, Messrs. *M'Larty & Co.* were adjudged bankrupts, and the Defendants were their assignees.

The bill was filed to have the proceeds of the ship, which had been sold by arrangement, applied according to the rights and interests of the parties.

The Vice-Chancellor held that the memorandum was ineffectual, according to the Merchant Shipping Act, 1855, for the purpose of creating any security upon the ship.

The case is reported in the 1st volume of *Messrs. Johnson & Hemming's Reports* (*a*).

Mr. *Giffard* and Mr. *Eddis* in support of the appeal.

The authorities on which the judgment of the Court below is founded are not applicable to the existing act of parliament. That act repeals all the former, and must be taken as alone constituting the present law of the country on this subject. It must be construed by reference to its own provisions, and not with reference to any enactments which have been repealed. There is nothing whatever in it to exclude ships from the ordinary law of the country which permits chattels to be held upon trusts. If there had never been any act of parliament on the subject before this, no doubt could have arisen on the matter. But the provisions of the act itself compared with those of the former act support this conclusion, and imply that from the passing of the act trusts were to be regarded. This is apparent from sections 37, 38, 39, 43, 55, 56, 58, 69, 100 and 103, and is above all conclusively shown by the omission in the present act of the negative words in

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in 8 & 9 Vict. c. 89, ss. 34 and 37, and in the former acts, on which the decisions on those enactments turned.

Mr. Rolt and Mr. De Gex for the assignees.

Although the former acts are repealed, the policy on which they were founded is not changed, for it cannot be supposed that the present act was designed without any recital or other indication of an intention to that effect to depart from and defeat that policy. A comparison of the former acts and the present will show that the provisions are nearly identical, and that the principles laid down in *Ex parte Yallop* (a); *Mestaer v. Gillespie* (b) still apply. If there had been an intention to alter these principles, the legislature would not have left so important a matter to be inferred and guessed at from a few provisions as to the details of particular dealings, but would have announced in a preamble the intention to change the policy of the law. The clauses relied upon are all capable of a different explanation than that which the Appellant seek to give to them. The 37th section of the act of 1854 is relied upon as recognizing equitable titles, but there are some cases in which such titles exist under the present as they did under the 8 & 9 Vict. c. 89, the 36th section of which notices such titles. The same remark applies to the 38th and 39th sections, on which reliance is placed. The 43rd, 55th, 56th, 57th, 58th and 69th sections are all in the Respondents' favor; for the omission of the unnecessary negative words which had been introduced into the former act cannot be enough to show a change in the policy of the law. The 100th section is accounted for by the exceptional cases of beneficial ownership which existed both in the new and old acts; and the 103rd affords no more proof than the 23rd section of the 17 & 18 Vict. c. 104, did of the intention of the legislature

(a) 15 Ves. 60.

(b) 11 Ves. 621.

legislature to recognize trusts. On the other hand, all the careful provisions for constituting the ship's papers on board conclusive evidence of her ownership, and the other provisions from which the policy of the former acts was inferred, remain and leave applicable to the present case all the principles laid down in *Hughes v. Morris* (*a*) and *M'Calmont v. Rankin* (*b*).

Mr. Giffard, in reply.

Judgment reserved.

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*The LORD CHANCELLOR.*

On account of the great importance of this case to the commercial interests of the country, I have very deliberately examined the statutes and the authorities on which it depends; and having done so, I have little more to observe than that I entirely approve of the decision appealed against, and concur in all the reasoning of the Vice-Chancellor by which he supported it. Indeed, his very elaborate and masterly judgment seems to me entirely to exhaust the subject.

Dec. 12.

I will only add, that if the statute 17 & 18 Vict. c. 104, had been the first and only legislation respecting the transfer and mortgage of British ships, I should have held that the forms of transfer and mortgage required by sections 55 and 66 must be substantially followed, although there be no negative words declaring that all transfers and mortgages in any other form shall be null and void. No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments

(*a*) 2 *De G., M. & G.* 349.      (*b*) 2 *De G., M. & G.* 403.

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ments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed. Looking to the great peculiarity of the forms of transfer and mortgage here required, and the purposes which they were to serve, I cannot doubt that the legislature intended that these and no other forms were to be used. A disclosure of the true and actual owners of every British ship is considered to be of the utmost importance with a view to the commercial privileges which British ships are entitled to, and, still more, with a view to the proper use and the honor of the British flag. The state can only obtain the desired information by the register disclosing the names of the true owners, and by the register being considered by the state the only evidence of ownership. To acknowledge the title of a totally different set of owners from that represented in the register would, I think, be at variance with the policy, and a violation of the enactments of the legislature.

The case of the Appellant seems to me to depend entirely upon a comparison between 17 & 18 Vict. c. 89, and the other antecedent acts respecting the registration of ships, and upon finding in antecedent acts express negative and nullifying words, which are now omitted. But this comparison seems to me quite insufficient to indicate such an important change in the policy of the legislature as is contended for,—when we consider that the statute now in force also re-enacts the clauses of the former acts, which prove the great importance attached by the legislature to the information which an observance of the present forms alone can secure. And, if it had been the wish of the legislature to give effect indiscriminately to all the modes in which at common law an equitable

equitable interest might be created in ships as in other chattels, surely a proviso would have been added to the mandatory sections,—that although these forms of transfer and mortgage are prescribed, any other should be held effectual.

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The objections arising from the use of the word "beneficial" in the 43rd and other sections are, I think, completely answered by the Vice-Chancellor.

His decision on this great question standing, the other questions on "reputed ownership" and the "Bill of Sales Registration Act" became immaterial, and I have only to adjudge that the appeal be dismissed with costs.



#### DUNCOMBE v. GREENACRE.

Nov. 26.

Dec. 13.

Before The  
Lord  
Chancellor  
LORD  
CAMPBELL.

Where a married woman was entitled under a will to a legacy charged on land, with power of entry and receipt of rents and profits: Held, that this power did not deprive the legacy of its equitable character, so as to enable

THIS was an appeal from the decisions of the Master of the Rolls, reported in Mr. Beavan's Reports (*a*), overruling a demurrer to the Plaintiff's bill, and granting an injunction restraining an action commenced by certain of the Defendants against the Defendant *Greenacre*.

The statements of the bill, which was filed by Mrs. *Duncombe*, were substantially as follows:—

*John Amies* (the Plaintiff's father) by his will dated in 1828, devised his real estate to his son *John Amies* in fee, subject nevertheless as to his real estate to the payment of the sum of 1,000*l.* to his daughter *Anna Elizabeth* (the wife

(*a*) Vol. 28, p. 472.

the husband to assign it free from the wife's equity to a settlement, but that the Court would, at the suit of the wife, and on the devisee paying the legacy into Court, restrain the husband's assignee from enforcing the legal remedies for the recovery of the legacy.

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wife of *James Duncombe*), at the end of six calendar months next after the decease of the testator's wife, *Mary Amies*, if his daughter should be living at the decease of *Mary Amies*. And the testator declared, that if default should be made in payment of the 1,000*l.* it should be lawful for his daughter to enter into and upon his said messuages, lands, tenements, hereditaments and real estate, or into and upon any part thereof in the name of the whole, and by receipt of the rents and profits thereof, or by demise, sale or mortgage of the same, or any part thereof, or by any other ways and means, to raise, recover and make up the sum of 1,000*l.*, or such part or parts of the same in payment whereof default should be made, and all the costs, charges and expenses of obtaining and recovering the same. And the testator gave the residue of his personal estate to his son.

The testator died in 1837, his widow died in 1853, and the 1,000*l.* then became payable.

After the testator's death his son sold the real estate to the Defendant *Greenacre*, charged with the 1,000*l.*, which *Greenacre* covenanted with the son to pay.

James Duncombe subsequently assigned by deed all his interest in the 1,000*l.* to trustees for the *Family Endowment Society*, by way of security for two sums of 450*l.* and 100*l.*, with interest.

James Duncombe some time afterwards took the benefit of the Insolvent Debtors Act in *England*, and subsequently to his insolvency the mortgagees of his interest in the sum of 1,000*l.* obtained a decree of foreclosure against his assignee in insolvency.

The 1,000*l.* remained unpaid, and the trustees of the *Family*

Family Endowment Society claimed to be entitled to receive the whole of it.

The bill then contained the following allegations:—

“The Plaintiff was married to *James Duncombe* in *January, 1828*, and has had two children by him, both of whom are now living. One, a daughter, was born in 1828, and is now the wife of *John Vandenberg*, and the other *James*, who was born in 1831, and is now residing in *Australia*.”

“The Plaintiff was educated and brought up as the daughter of a gentleman, and maintained in that position until the time of her marriage, and *James Duncombe* then and for some years afterwards followed the profession of an attorney and solicitor, and was in easy circumstances, maintaining himself, the Plaintiff and her children in comfort and respectability, but since his insolvency he has been and is now in very straitened circumstances, depending upon members of his family for his daily support and maintenance, and wholly unable to support and maintain the Plaintiff.”

“No settlement was made on the Plaintiff at the time of her marriage, and she is now and for a long time past has been dependant upon her brother *John Amies* for her maintenance and support, and has been for some time past and is now supported and maintained by him at his sole charge.”

“The society, as claiming through *James Duncombe*, seeks to reduce into possession the said legacy or sum of 1,000*l.* so given to the Plaintiff, and the Plaintiff insists and claims that she is entitled to have the whole or such competent part as this Court shall think fit of the said legacy

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legacy or sum of 1,000*l.* settled upon her and her children."

The bill proceeded to state that the society refused to recognize any right of the Plaintiff to have a settlement on herself and her children of any part of the 1,000*l.*, and had required the Defendant *Greenacre* to pay the whole to them, regardless of Plaintiff's rights and claims to a settlement thereout, and had threatened and were now about to take proceedings against *Greenacre*, to compel him to pay to them the legacy or sum of 1,000*l.* and interest; and that the Defendant *Greenacre* alleged that he was desirous of having the hereditaments charged with the 1,000*l.* released therefrom, and that he was willing to pay it to the parties entitled thereto.

The Defendants to the bill were *Greenacre, James Duncombe* and the trustees of the society, and the prayer was that the 1,000*l.* might be raised by sale or mortgage, for a declaration that the Plaintiff had a right to have the 1,000*l.* or a part thereof settled upon herself and children; that *Greenacre* might be at liberty to pay the 1,000*l.* into Court; and that, thereupon, the trustees of the society might be restrained from taking proceedings for the recovery of the 1,000*l.* or the property on which the same was chargeable, and from receiving it from *Greenacre* without making a settlement on the Plaintiff.

To this bill the trustees of the *Family Endowment Society* demurred for want of equity.

This demurrer having been overruled by the Master of the Rolls on the 5th *July*, 1860, a motion was made on behalf of the Plaintiff, that the Defendant *Greenacre* might be at liberty to pay into Court the 1,000*l.* and interest; and, he submitting to pay the same, that

that the trustees of the *Family Endowment Society* and the directors thereof might be restrained by injunction from recovering or taking proceedings for the recovery of the sum of 1,000*l.* and interest, or all or any part thereof, from the Defendant *Robert Greenacre*, or the property on which the same was chargeable.

On the 11th *July*, 1860, another motion was made by the Defendant *Greenacre* to pay the money into Court.

On the 16th *July* the Master of the Rolls granted both motions.

The trustees of the *Family Endowment Society* appealed from all these decisions.

Mr. *Selwyn* and Mr. *E. Rodwell* for the Appellants.

Upon the true construction of the will, the 1,000*l.* in question, though charged on real estate, was a mere legal chattel interest, which became vested in the husband in right of his wife. The right and remedy on the part of the husband and his assignees for the recovery of the chattel assigned is complete at law; *Jemott v. Cowley* (*a*); *Co. Litt.* (*b*); *Lord Carteret v. Paschal* (*c*). That being so, the wife's right to a settlement out of the fund does not attach, there being no necessity on the part of the husband or his assignees to have recourse to a Court of Equity to recover the thing assigned. Such an equity cannot be created by the mere filing of a bill on the part of the wife, or by the fact that the owner of the estate charged is willing to pay, and does accordingly pay, the fund into Court; *Burdon v. Dean* (*d*); *Sturgis v. Champneys* (*d*). The Court will not lay hold of that

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(*a*) 1 *Wm. Saund.* 112*b.*

(*b*) *Page* 203.

(*c*) 3 *P. Wms.* 197.

(*d*) 5 *Myl. & Cr.* 97.

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mere accidental circumstance to fasten an equity on the fund, which otherwise could have no existence; *Hill v. Edmonds* (*a*). To unsettle the well-defined rule upon this question would give rise to great inconvenience.

Mr. Roundell Palmer and Mr. Fooks, for the Plaintiff.

This demurrer is to a bill praying to have the legacy raised, not to have the Plaintiff's equity to a settlement enforced if the legacy is not raised. If, therefore, the Plaintiff has a right in this Court to have the legacy raised, the demurrer has been properly overruled. That she has a right to sue here for a legacy there can be no doubt, and the power of entry, sale, &c. given her by the will cannot supersede that right. To entitle the wife to a settlement it is not necessary to show that the wife's title is in its nature exclusively equitable; *Lady Elibank v. Montolieu* (*b*). A wife's title to a legacy may be enforced in the Ecclesiastical Courts, but if the husband sues in those Courts to recover the wife's legacy without making a proper settlement upon her, this Court will restrain him by injunction; *Hill v. Turner* (*c*); *Meals v. Meals* (*d*). The wife's right to a settlement arises in this Court wherever the husband's legal right is inconsistent with the wife's equitable rights; *Carter v. Taggart* (*e*); *Oswell v. Probert* (*f*); and the jurisdiction of this Court is not ousted because there is another jurisdiction available. The legacy is not a legal chattel. The charge does not confer a legal interest either in the money or the land, but, with the attendant powers of entry, distress, &c. merely confers a means of realising the fund. Neither the husband nor his assignees could recover the money in an action, and under the power of entry

(*a*) 5 *De G. & Sm.* 603.

(*d*) 1 *Dick.* 373.

(*b*) 5 *Ves.* 737.

(*e*) 5 *De G. & Sm.* 49.

(*c*) 1 *Atk.* 515.

(*f*) 2 *Ves. jun.* 680.

entry upon the land they could only obtain payment by perception of the rents for a series of years, unless with the consent of the owner of the land.

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Mr. *F. J. Turner* for the Defendant *Greenacre*.

Mr. *E. Rodwell*, in reply, cited *Anon. (a)*.

Judgment reserved.

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*The LORD CHANCELLOR.*

I am of opinion, that there is no ground for this appeal. Dec. 13.

Looking to the allegations of the bill, I agree with the Master of the Rolls in thinking that the demurrer ought to be overruled.

The legacy of 1,000*l.* left by the testator *John Amies* to his daughter the Plaintiff, the wife of *James Duncombe*, seems to me to be an equitable chose in action, out of which she is entitled to a settlement. The charge is equitable in its origin and in its nature. The bill, after setting out a devise of the lands to the testator's son in fee simple subject to an annuity of 50*l.* to his wife for life, adds, "and also subject to and the said testator did thereby expressly charge his said lands, &c., with the payment of the sum of 1,000*l.* unto his daughter *Anna Elizabeth*, the wife of *James Duncombe*, at the end of six months next after the death of the said testator's wife." Stopping here, it never could have been doubted that this was an equitable

(a) 1 *Atk.* 491.

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equitable charge, out of which the wife would have been entitled to a settlement if the husband had filed a bill to raise the charge; and since the case of *Lady Elibank v. Montolieu* (*a*) it could not have been doubted that the wife actively might have filed a bill to obtain a settlement, although the husband had remained passive.

The Appellants rely upon what follows in the statement of the will:—"and the said testator declared, that if default should be made in payment of the said sum of 1,000*l.*, it should be lawful for his said daughter to enter into and upon his said lands, &c., and by receipt of the rents and profits thereof, or by demise, sale or mortgage of the same or any part thereof, or by any other ways and means, to raise, recover and make up the said sum of 1,000*l.*, or such part or parts of the same in payment whereof default should be made, and all the costs, charges and expenses of obtaining and recovering the same." But the legacy still remains an equitable charge, which a Court of Equity would have an undoubted jurisdiction to raise. The legacy had not been converted into a legal chattel interest. No direct legal remedy is given to recover the 1,000*l.*, and the jurisdiction of a Court of Equity continues in full force. The right of entry is only given to the daughter, and would not enable her, without the aid of a Court of Equity, at once to obtain payment of the 1,000*l.* There may be a remedy by which payment of the 1,000*l.* might ultimately be obtained without resorting to a Court of Equity; and upon this the Appellants' counsel mainly relied, contending, that if the money could by any means be raised by the husband without coming into equity the wife has no right to a settlement. The great authority cited for this proposition is *Sturgis v. Champneys* (*b*). But before considering

(*a*) 5 *Ves.* 737.

(*b*) 5 *Myl. & Cr.* 97.

considering the language of Lord *Cottenham* in that case, we must see what was the question which was then before him for decision. The assignee of an insolvent debtor, whose wife was entitled for life to real property, being obliged to come into equity to enforce his title to the rents during the joint lives of the husband and wife in consequence of the legal estate being vested in mortgagees, the question was, whether a provision ought to be made for the wife? Lord *Cottenham*, after elaborately reviewing the authorities, says, "it appears that the equity which this Court administers in securing a provision and maintenance for the wife is founded upon the well-known rule of compelling a party who seeks equity to do equity." Hence the inference is now drawn, that wherever the husband has the means of getting possession of the wife's property without the assistance of a Court of Equity she shall have no claim to any provision out of it.

But although it may probably have been in a case in which the husband was actively seeking the aid of a Court of Equity by filing a bill in Chancery to get at property claimed by him in right of his wife, that this reason was given for compelling him to do equity by making a provision for the wife, in right of whom the claim was made, it is quite clear that, as the law now stands, in a case in which the remedy is purely equitable the wife may file a bill and obtain a provision, and Lord *Cottenham* had no occasion to consider the effect of there being a cumulative remedy by resorting to another tribunal in aid of the equitable right.

If a Court of Equity has jurisdiction over a fund and may decree the raising and disposing of it, seeing that equity is done to all who have an equitable claim upon it, although the fund may be raised or recovered through
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the agency of another tribunal, the Court of Equity will not allow its power of equitably disposing of the fund to be defeated by an attempt to raise or recover the fund through the agency of that other tribunal. In the time of Lord *Hardwicke* this doctrine seems to have been well established with respect to legacies which might then have been recovered by a suit in the Ecclesiastical Court as well as by a suit in the Court of Chancery. Thus, in an *Anonymous Case* (*a*), where a bill had been filed for an injunction to stay a suit in the Ecclesiastical Court for a legacy upon the ground that an Ecclesiastical Court cannot make a legatee refund in case of a deficiency of assets, the "Lord Chancellor continued the injunction till the hearing, because the Plaintiff is an executor in trust only; for where there is a trust or any thing in the nature of a trust, notwithstanding the Ecclesiastical Court have an original jurisdiction in legacies, yet this Court will grant an injunction, trusts being only proper for the cognizance of this Court." The reporter adds, "his Lordship mentioned a case where a woman, an infant, was entitled to a legacy upon her marrying; the husband instituted a suit in the Ecclesiastical Court for it, which he might do; but upon the executors bringing a bill and suggesting this matter to the Court an injunction was continued till the hearing of the cause." Again, in the case of *Hill v. Turner* (*b*), I find the following dicta of Lord *Hardwicke*,—"for an injunction when awarded does not deny, but admits, the jurisdiction of the Courts of Common Law, and the ground upon which it issues is that they are making use of their jurisdiction contrary to equity and conscience. The same with regard to the Ecclesiastical Court in case of a legacy left in trust; where the trustee is suing for payment into his own hands, the Court will restrain him out of regard to the interest

(a) 1 *Atk.* 491.(b) 1 *Atk.* 515.

interest of cestui que trust; and will do it likewise in the case of a portion devised to a daughter upon marriage, where the husband is suing for it before he has made an adequate settlement."

1860.  
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The decision of Lord *Northampton* in *Meals v. Meals* (a), in which he acted upon this doctrine, is an authority expressly in point. "The Plaintiff, a feme covert, being entitled to a legacy under the will of her aunt, and the executor refusing to pay it to the husband, he instituted a suit in the Spiritual Court for the legacy; the Plaintiff, his wife, filed her bill in this Court for an injunction to stay her husband from proceeding in the Spiritual Court for the legacy, which was granted, the husband not having made any settlement on or provision for the Plaintiff his wife."

On the same principle, where there is a charge on land for the benefit of a married woman, which a Court of Equity has jurisdiction to raise, making a provision for the wife, if there be an attempt to raise the charge by other means, with a view to prevent the wife from obtaining a provision to which she would be entitled in a Court of Equity, I am of opinion that the Court of Equity ought to grant an injunction, and to make the same provision for her which she would have obtained had she sued for a provision out of the fund before any attempt to raise it by other means had been resorted to.

If the demurrer were to be allowed, the order of 11th July, 1860, and the injunction must fall with the bill; but if the bill is to be supported it supports the order and the injunction, for in that case proceedings at law ought not to be permitted, and it is proper that the 1,000*l.* should

(a) 1 *Dick.* 373.

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should remain in Court to be equitably disposed of as the Court shall think fit. Sitting here, I should not feel myself at liberty to sanction any new principle for the protection of married women against spendthrift and reckless husbands, and to secure to them the enjoyment of the property intended for their benefit; but I may, without impropriety, express my satisfaction that, according to established principles and rules, the Master of the Rolls has been able in this instance to protect a married woman against the misconduct of a husband, who has attempted to make away with the provision made for her by her father and has left her and her children destitute.

The appeal must be dismissed with costs.

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1860.

COULSON *v.* ALLISON.

THIS was an appeal from a decree of Vice-Chancellor *Stuart*, directing a deed to be delivered up to be cancelled under the circumstances mentioned in Mr. *Giffard*'s report of the hearing below (a).

The short facts were the following:—

On the 1st of July, 1853, *John Nicholson* married *Ann Welbank*, his deceased wife's sister.

By a deed dated in October, 1853, purporting to be a post-nuptial settlement, and to be made between *John Nicholson* and *Ann* his wife of the one part, and a trustee of the other part, they the said *John Nicholson* and *Ann Welbank* (therein described as his wife) conveyed and assigned certain freeholds belonging to *Ann Welbank*, and also a bond debt of 900*l.*, then due to *Ann Welbank*, to *John Nicholson* absolutely. The deed, having been prepared by solicitors acting for *John Nicholson*, was executed by *Ann Welbank*, and acknowledged by her as a married woman.

In January, 1854, *Nicholson* received the principal and interest due upon the bond from one *Peck*, the obligor.

In December, 1859, *Ann Welbank* left *Nicholson's* house, and from that time lived separate and apart from him.

*Dec. 4.  
Before The  
Lord  
Chancellor  
LORD  
CAMPBELL.*

Where a widower married the sister of his deceased wife:—*Held*, that the relation thus constituted imposed upon the widower, claiming the benefit of a settlement made on him by his wife's sister, the onus of showing that at the time of entering into the transaction she was fully, fairly and truly informed of its character and of her legal status.

Such a marriage and consequent co-habitation held not a sufficient consideration to support a conveyance by the wife's sister of her property to the widower absolutely.

In

(a) See 2 *Giff.* 279.

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 v.  
 ALLISON.

In *January*, 1860, *Ann Welbank*, in consideration of 1,100*l.*, conveyed the freehold property comprised in the indenture of *October*, 1853, to her brother *Jonathan Coulson* in fee.

Shortly afterwards *Nicholson* advertised the freehold property comprised in the indenture of *October*, 1853, for sale; whereupon *Coulson* filed the original bill in this suit, for the purpose of having that deed set aside.

*Nicholson*, by his answer to the bill, stated that the deed of *October*, 1853, which comprised all the property real and personal of *Ann Welbank*, except a small annuity, was executed by her in consideration of his paying her debts, and supporting and maintaining her as his wife; and that he had accordingly paid her debts, amounting to 300*l.*, and supported and maintained her as his wife up to the time of her leaving him in *December*, 1859; and that he was still willing to maintain and support her in that character.

The bill was subsequently amended by joining *Ann Welbank* as a co-Plaintiff, and, as amended, prayed that *John Nicholson*, might be ordered to pay to *Ann Welbank* the 900*l.* he had received from the obligor of the bond, assigned by the indenture of *October*, 1853, less the amount he had paid in discharge of the debts and liabilities of *Ann Welbank* before she went through the ceremony of marriage with him.

*Ann Welbank*, by her affidavit, deposed that in *August*, 1859, she became, for the first time, aware of the fact that the marriage which had been solemnized between *Nicholson* and herself was invalid.

The

The solicitors, who had acted for *Nicholson* in the impeached transaction, deposed on the other hand, that previously to the execution by *Ann Welbank* of the deed of *October, 1853*, they read and explained a draft of it to her; and at the same time informed her that in all probability her marriage with *Nicholson* was void; notwithstanding which she represented to them that the transaction was in accordance with her wishes; that she understood the nature of the deed, and wished it to be carried into effect, though the marriage might be void or voidable.

**Mr. Malins** and **Mr. R. W. E. Forster**, for the Plaintiffs.

There are two grounds for setting aside the deed of *October, 1853*. First, its execution was procured by the undue influence exercised over *Ann Welbank* by the man whom she supposed to be her husband, and who, therefore, must be considered to be standing in a fiduciary relation towards her; *Page v. Horne* (*a*); *Cooke v. Lamotte* (*b*); *Hoghton v. Hoghton* (*c*); *Huguenin v. Baseley* (*d*).

Secondly, the consideration of marriage, for which it was given, has failed, the marriage being void. As to the bond, *Nicholson* must, under the circumstances, be considered to have received it as her trustee, and time could not begin to run until adverse possession commenced on the separation of the parties in *December, 1859*.

**Mr. Greene** and **Mr. Marett**, for the Defendant *John Nicholson*.

The evidence shows that *Ann Welbank*, when she executed

(*a*) 11 *Beav.* 227.  
(*b*) 15 *Beav.* 234.

(*c*) 15 *Beav.* 278.  
(*d*) 14 *Ves.* 273.

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Coulson  
v.  
Allison.

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Coulson
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executed the deed, was well aware that the marriage was invalid. The deed was, moreover, executed for valuable consideration, viz., the payment of her debts and future maintenance and support. Her debts, amounting to 300*l.*, have been paid, and *Nicholson* kept a house for her, and maintained her until she left him, and is still willing to do so.

Mr. *Bacon* for the Defendant *Allison*, a mortgagee of the freeholds in dispute.

Mr. *Forster* in reply.

The main consideration for the conveyance impeached was the belief of *Ann Welbank* that her marriage with *Nicholson* was valid, and that she was entitled to all the advantages resulting from the relation of husband and wife. In the fiduciary relation in which she and *Nicholson* then stood towards each other, it should have been stated to her that by law the marriage was absolutely void, and not merely voidable or open to doubt. The deed of *October*, 1853, is void on the grounds of failure of the consideration, and of undue influence.

The LORD CHANCELLOR.

After hearing the able argument on both sides, I am of opinion that the decree of the Vice-Chancellor ought to be affirmed to the full extent. In the first place, it appears to me, that the Defendant *Nicholson* and *Ann Welbank*, after having gone through the marriage ceremony, and while living together as man and wife, were under a relation which was fiduciary towards each other, and which, although they were not actually man and wife, render it necessary for *Nicholson*, in order to establish his claim, to show that she was, at the time of the transaction, fully and duly informed of all the circumstances of the case, and of the possible consequences of what she was about to do.

I am

I am of opinion, that though there is here no proof of threats or pressure, or solicitation having been used, there is an entire absence of evidence establishing that the woman was fully, fairly and truly informed of the situation in which she stood. It was represented to her as a matter of some doubt, whether the alleged marriage was valid or not, whereas at that time it had been solemnly adjudged that the marriage of a widower with a sister of his deceased wife was illegal, and absolutely null and void. She ought to have been informed of that, and not left in a state of uncertainty as to the consequences which might result from a continuation of her cohabitation with *Nicholson*. Again it is not made to appear that *Ann Welbank* was duly warned of the risk she ran in executing a deed conveying away all her property, except her small annuity, to *Nicholson*, of being abandoned at any moment and left without any other resource than her annuity. The moving consideration for the deed was clearly the notion of a valid subsisting marriage. This is shown by the wording of the deed, every syllable of which proceeds upon the footing of a supposed subsisting marriage, and it is further shown by her executing it and acknowledging it in the character of a married woman. But, supposing even both *Nicholson* and *Ann Welbank* to have been aware of the true state of the law, and to have nevertheless agreed to cohabit together, she being his mistress and not his wife, it seems to me the deed would then have been impeachable on the ground of immorality, for nothing can well be conceived more immoral than for a woman to make over the whole of her property to a man in contemplation of continuing an illicit intercourse with him for the remainder of their joint lives. As to the objection that the claim in respect of the bond debt is barred by the Statute of Limitations, I think that has been fully met by the argument of Mr. *Forster*, that, looking at all the circumstances

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cumstances of the case, *Nicholson* must be considered as having received the bond debt as trustee for *Ann Welbank*, and that time under the statute could not begin to run till they separated in 1859.

For these reasons, I am of opinion that this appeal must be dismissed, and with costs.

PARMITER *v.* PARMITER.

Ex parte PARMITER.

*Dec. 12.*

*Before The  
Lords Jus-  
tices.*

Leave to a person not a party to the record to present a petition of appeal may be granted either upon motion or petition ex parte.

THIS was an application by motion ex parte on behalf of a person not a party to the record, but who claimed a sum of 1,100*l.* as the representative of a creditor in an administration suit, for leave to present a petition of appeal from the disallowance of his claim by Vice-Chancellor *Wood*, under the circumstances appearing in *Parmiter v. Parmiter* (*a*).

Mr. C. T. *Swanson*, in support of the application, having, at the request of their Lordships, inquired of Mr. *Monro*, the Registrar, as to the practice, stated that leave had been given upon petition ex parte in the case of *Hodgson v. Clarke* (*b*), in January, 1860, and that Mr. *Monro* considered that, according to the practice, leave to appeal might be obtained either on motion, or petition ex parte.

*The LORD JUSTICE KNIGHT BRUCE.*

If leave may be given on petition ex parte, it may also on motion ex parte.

*The*

(*a*) 1 *John. & Hem.* 135.    (*b*) 1 *De G., F. & J.* 394; 1 *Giff* 139.

*The Lord Justice Turner.*

According to my recollection, it may always be done  
on an ex parte petition.

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PARMITER
v.
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An order was made for leave to present the petition.



In the Matter of BENJAMIN TURNER, a person of
unsound Mind, not found so by Inquisition,

And in the Matter of the Trusts of the Will of JOHN
MIDGLEY,

And in the Matter of the TRUSTEE ACT, 1850.

THE question in this case was, whether the codicil of
John Midgley vested the legal estate of his real
property in the persons thereby appointed trustees.

The testator, by will dated the 22nd of *December*,
1820, devised and bequeathed freehold and leasehold
estates to his wife *Sarah Midgley* for life, and after her
death to *William Tetley* and *John Greenwood*, their
heirs, executors, administrators and assigns, upon the
trusts therein mentioned, and appointed his wife and
Tetley and *Greenwood* his executors.

Dec. 7, 14.
Before The
Lords Jus-
tices.

A testator de-
vised property
to *A.* for life,
remainder to
B. and *C.* in fee
upon trusts,
and appointed
A., *B.* and *C.*
his executors.
By a codicil
he revoked the
appointment
of *B.* to be a
trustee and
executor, and
appointed *A.*,
C. and *D.*
trustees and
executors, as
fully and
effectually to
all intents and
purposes and
in all respects

On the 24th of *June*, 1829, the testator made a codicil
to his will, and thereby, after reciting that by his will he
had named his wife and *Tetley* and *Greenwood* to be his
executrix and executors, and also trustees of his will, he
revoked

as if they had originally by his will been appointed to be the trustees and executors
thereof. Held, that the legal estate passed to *A.*, *C.* and *D.*

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revoked the nomination of *Greenwood*, and declared that *Greenwood* should not be either trustee or executor, but that his, the testator's, wife and *William Tetley* and *Samuel Turner* should be the only trustees, executrix and executors of his said will; and he went on to declare, that he did thereby accordingly make, ordain, substitute and appoint them the said *Sarah Midgley*, *William Tetley* and *Samuel Turner* joint and sole trustees, executrix and executors of his said will, as fully and effectually to all intents and purposes and in all respects as if they only, and no other person or persons, had been by him originally in and by his said will constituted, ordained and appointed to be the trustees, executrix and executors thereof: but the codicil did not in terms devise the trust property to them.

Samuel Turner survived *Mrs. Midgley* and *Tetley*, and died intestate as to trust estates, leaving an heir-at-law, who was of unsound mind.

A petition was now presented for the appointment of new trustees and a vesting order.

Mr. *Freeling*, in support of the petition, urged, that the appointment, by the codicil, of trustees in the place of the trustees named in the will, to whom the estates had, by the will, been expressly devised, amounted to a devise by implication to the substituted trustees.

He referred to *Re Hough's Will* (*a*), and to the vesting order subsequently made in that case (*b*), which showed that

(*a*) 4 *De G. & Sm.* 371.

(*b*) 20 Dec. 1851. "That the estate and interest in the said two messuages or dwelling-houses by the said will devised to the said

John Lomax and *Fisher Red-*

head vest in the said *Edward Bull* and *Thomas Horn*, as such new trustees." *Reg. Lib.* 1851, *A.* fol. 259.

that the precise point now in question had been decided, and that the case had rightly been referred to in *Jurman on Wills* (a) as an authority upon it. He also referred to *Re Lynch's Trusts* (b); *Trent v. Hanning* (c); *Oates v. Cooke* (d); *Doe v. Gillard* (e); *Anthony v. Rees* (f).

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Their Lordships were of opinion, that the effect of the codicil was to vest the legal estate in the body of trustees thereby appointed, and made the order.

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| (a) <i>Vol. 2, p. 250 (2nd edit.)</i> | 1 <i>Dow.</i> 102. |
| (b) 5 <i>De G., M. & G.</i> 188, | (d) 3 <i>Burr.</i> 1684. |
| 221. | (e) 5 <i>B. & Ald.</i> 785. |
| (c) 7 <i>East.</i> 97; 10 <i>Ves.</i> 495; | (f) 2 <i>Cr. & J.</i> 75. |

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In the Matter of STORIE'S UNIVERSITY GIFT,
and

In the Matter of THE CHARITABLE TRUSTS
ACTS, 1853 and 1855.

THIS was an appeal from the construction put by the Master of the Rolls upon the scheme sanctioned by the Court of Chancery in the year 1826, for the regulation of the above-mentioned charity.

Nov. 16, 19.
Dec. 18.
Before The
Lords Jus-
tices.

By the terms
of a scheme
for the regula-
tion of a cha-
rity for the
presentation of
exhibitors
to the univer-
sities, the ex-

hibitioners were to be elected from boys "who shall have been" or "who have been" three years at the free grammar school of W. Held, that the boys to be elected were boys who had been three years at the school at the time of and immediately preceding the election.

It is not according to the course of the Court to remove persons who have been elected as objects of a charity, upon an erroneous construction of the scheme for its regulation, where the election has been made bona fide and without fraud or corruption.

Petitioners seeking to have a construction put upon a scheme for the regulation of a charity, though induced mainly by private interest to apply to the Court, held, nevertheless, entitled to their costs out of the charity funds, there having been a bona fide substantial ground for the application.

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counsel are stated in the judgment of the Lord Justice *Turner*.

Mr. *Roundell Palmer* and Mr. *Karslake* supported the appeal, citing *Gaunt v. Taylor* (*a*); *The Attorney-General v. Pearson* (*b*); *The Corporation of Ludlow v. Greenhouse* (*c*); *Co. Litt.* 42a.

Mr. *Selwyn*, and Mr. *Kay* and Mr. *Follett* and Mr. *Druce*, for the several Respondents, cited *The Attorney-General v. The Earl of Stamford* (*d*); *Re Beloved Wilke's Charity* (*e*); *Monro v. Taylor* (*f*); *Re University College, Oxford, Ex parte Moorsom* (*g*); *Re the Parish of Upton Warren* (*h*); *Re Dean Clarke's Charity* (*i*).

Mr. *R. Palmer* replied.

Judgment reserved.

The LORD JUSTICE KNIGHT BRUCE.

Dec. 18.

I agree with the Charity Commissioners in their construction of the scheme before us in this case, so far as they have construed it.

I think, accordingly, that the Respondent Mr. *Westmoreland* was not duly elected, that is to say, was not entitled to be elected an exhibitioner on the foundation in

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| <i>(a)</i> 2 <i>Hare</i> , 413—421.
<i>(b)</i> 3 <i>Mer.</i> 353, 400.
<i>(c)</i> 1 <i>Bl. N. S.</i> 17.
<i>(d)</i> 1 <i>Ph.</i> 737.
<i>(e)</i> 3 <i>Mac. & G.</i> 440. | <i>(f)</i> 8 <i>Hare</i> , 51.
<i>(g)</i> 2 <i>Ph.</i> 521.
<i>(h)</i> 1 <i>Myl. & K.</i> 410.
<i>(i)</i> 8 <i>Sim.</i> 34. |
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in question ; and that not any election open to the same objection as his, with reference to the manner of computing or reckoning the term of three years and to the circumstance of a youth being or not being a scholar of the *Wakefield School* at the time of election, should take place hereafter.

But the question of now removing or displacing Mr. *Westmoreland* is different. All considerations belonging to a case of unfair dealing or of artifice or of partiality seem to be out of place here. If error there was, it seems to have been honest and excusable error. He was of a family resident in *Wakefield*, and had been for some years at the school. His conduct seems to have been unimpeached, his advancement in learning sufficient ; and, attending to the length of time which elapsed between his election and the presentation of the Petitioners' original petition, and all the circumstances in evidence, I am of opinion that, in the proper exercise of a judicial discretion, Mr. *Westmoreland* ought not now to be displaced or interfered with. The interval of time that I have just mentioned was more than eleven months, and was of considerable importance to him at his period of life. During the whole of it he enjoyed and acted on the exhibition, and now to take it from him without any fault on his part would, in my opinion, be an act of unnecessary harshness.

The original petition should, in my judgment, stand dismissed against him. I think that the Petitioners should not pay him or the governors or the trustees any costs ; that the governors or trustees should take their costs out of the funds of the charity ; and that there should be a declaration as to the construction of the scheme, and adherence to it in future to the effect that I have mentioned. I have said nothing as to the costs of the

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the Petitioners and Mr. *Westmoreland*. My learned Brother I understand to be of opinion that their costs also should be paid out of the charity funds, a course from which I shall not dissent.

The LORD JUSTICE TURNER.

This is an appeal from an order of the Master of the Rolls, by which he dismissed a petition presented by the Appellants in the matter of this charity and of the Charitable Trusts Acts, 1853 and 1855, in relation to an exhibition to the university which was founded by the will of *John Storie*, and afterwards regulated by a scheme approved by this Court in the year 1826.

John Storie, by his will, in the year 1674, gave and bequeathed his lands, both copyhold and freehold, for the maintaining and bringing up of three boys, the children of such parents as were not able to bring them up, at one of the universities of this nation, viz. *Cambridge* or *Oxford*, for three years; and he declared his mind and will to be that the said three boys should be chosen out of those poor children that he had lately settled lands upon for their teaching at a petty school until they should be fit to go to the free grammar school at *Wakefield*, and to be sent from thence and maintained at one of the universities aforesaid for three years, and after that time other boys of the same to be sent up and maintained there successively for ever.

The lands thus devised, or other lands taken in exchange for them, constitute the property of the charity called "*Storie's University Gift*."

It does not appear that the testator had, before the date of his will, made the settlement of lands for teaching poor

poor children at the petty school to which he refers by the will; but soon after the date of his will he conveyed some lands to the governors of the free school at *Wakefield*, upon trusts which had for their object the founding a petty school for the education or early teaching of young children, who were to be children of the inhabitants of *Wakefield*, taken from certain streets in the town of *Wakefield*. These lands form the property of a charity which is in these proceedings called "*Storie's Petty Gift*."

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This latter charity has, from the early part of the eighteenth century, been united with a charity school at *Wakefield*, which appears also to be under the government of the governors of the free school; but it does not appear that any boys have ever passed from the charity school to the free school, or consequently through the free school to the university.

The property of the charity called "*Storie's University Gift*" appears also to have become vested in the governors of the free school; and the rents of the estates belonging to the charities having greatly increased, the governors, on the 18th *April*, 1825, obtained an order under Sir *Samuel Romilly's Act*, 52 *Geo. 3*, c. 101, for a reference to the Master to approve of a scheme for the future application of the revenues of the charities.

In pursuance of this order, the Master made his report, which was afterwards confirmed by the Court, by which report he sanctioned the continuance of the custom of paying the income of the petty gift to the master of the charity school at *Wakefield*; and, with respect to the university gift, he found that it had been proposed before him, and he approved of the scheme, "that the governors should be at liberty to apply the rents, revenue and

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and income of the estate called 'Storie's University Gift,' and the property purchased with and arising out of the surplus rents and accumulations therein mentioned, to maintain and bring up three boys born in the town of *Wakefield* at one of the universities of *Oxford* or *Cambridge*, for four instead of three years, such boys to be elected out of the boys who should have been three years at the free grammar school at *Wakefield*; and that in case there should not be any boys fit to be elected, born within the town of *Wakefield*, then that the governors might be at liberty to elect boys born within the parish of *Wakefield*, who had been three years at the free grammar school at *Wakefield*; and if there should be none fit to be elected, born within the parish of *Wakefield*, then that the governors might be at liberty to elect any other boys who had been three years at the free grammar school at *Wakefield*; and in case there should be no boys candidates for such charity from the said free grammar school, then that the governors might be at liberty to invest the surplus revenue of the charity in the public funds, or in the purchase of lands to accumulate for the future use of the charity."

This scheme was not, it appears, considered by the governors to render it incumbent upon them to elect to the university exhibition boys who were at the school at the time of the election and had been there for the three years immediately preceding it; but boys who had at any time been at the school for three years were considered by them to be eligible to the exhibition, although they might have left the school long before the election and gone to the university or other schools. From a list of the exhibitors appended to one of the affidavits in this case it appears that out of twenty-six boys elected between *January*, 1827, and *June*, 1857, six only were at the school at the time of the election; and that the remaining

remaining twenty, when elected, had left the school and, as to most of them, gone to other schools and been there for many years. It appears, however, that in the year 1857 the governors were desirous of having an alteration made in the practice of electing boys who were not at the school at the time of the election, at least to the extent of requiring that the boys elected should have been at the school for one year immediately preceding the election; and they applied to the Charity Commissioners upon the subject. This application ultimately led to their requesting the official opinion of the commissioners upon the construction of the scheme; and, in the month of *January*, 1858, they were furnished with that opinion, which was as follows:—

“The Board of Charity Commissioners having considered an application made to them by the governors of the above-mentioned grammar school, as the trustees of the above-named charity, for the opinion and advice of the said board upon the questions hereinafter mentioned or referred to in relation to the said above-mentioned charity, do hereby give their opinion and advice to the said governors as follows:—According to the proper construction of the scheme established for the regulation of the above-mentioned charity by an order of the High Court of Chancery, dated the 8th of *July*, 1826, the exhibitioners under the said charity should be elected by the governors from boys who shall have respectively attended as scholars at the aforesaid free grammar school for the period of not less than three consecutive years immediately preceding the date of their respective elections, and who shall be ascertained by the said governors to be fitted by their respective attainments and characters to be so elected, and to be in all other respects duly qualified for election to such exhibition according to the provisions of the said scheme.”

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The

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The opinion thus given by the commissioners appears to have been acted upon by the governors at the election of an exhibitioner which took place in the month of *June*, 1858; but at the next election, which took place in the month of *June*, 1859, it was not acted upon by them.

There were three candidates for the exhibition at that election—*Fitzherbert Astley Cave*, one of the Petitioners in this matter; *Joseph Westmoreland*, a Respondent to the petition, and *James Heber Taylor*.

The Petitioner *Fitzherbert Astley Cave* was at the school at the time of this election, and had been there for three years immediately preceding it; and both the Respondent *Joseph Westmoreland* and *James Heber Taylor* had been pupils at the school for three years, but neither of them was at the school at the time of the election, or had been there for some time previous to it. The Respondent *Joseph Westmoreland* indeed had been for five years immediately preceding the election a pupil at *Shrewsbury School*. He appears, however, to have been the only one of the three candidates who was born in the parish of *Wakefield*, and he was elected exhibitioner. There was, it appears, an examination of the boys at the school shortly previous to the election, but the Respondent *Joseph Westmoreland* was not present at the examination. He had, however, satisfactory testimonials from Dr. *Kennedy*, the Master of *Shrewsbury School*, and the practice of the governors seems to have been to act upon such testimonials in the case of boys who had left the school, and not to subject them to examination. Indeed, the examination held before the election seems to have been only the usual half-yearly examination held for testing the progress of the boys.

It was under these circumstances that the petition out
of

of which this appeal arises was presented. It was presented on the 11th June, 1860, by *Fitzherbert Astley Cave*, by *Brown Cave*, his father and next friend, and by the father and *Thomas Whitcher*, an inhabitant of *Wakefield*, and it prayed, "That it might be declared that the appointment or election of *Joseph Westmoreland* to the exhibition was null and void, and that the governors might be directed to take all necessary steps for rescinding and annulling the said appointment or election; that it might be declared that the Petitioner, *Fitzherbert Astley Cave*, was entitled to the exhibition or benefit in the place of *Joseph Westmoreland*; or otherwise that the said governors might be directed forthwith to hold another election of a boy who had been three years at the grammar school, to be maintained and brought up at the university in the place of *Joseph Westmoreland*; and that, if necessary, the governors might be restrained by injunction from paying the yearly stipend or sum of 80*l.* to *Joseph Westmoreland*; that all proper directions might be given for carrying into effect the several purposes aforesaid; and that the governors might be ordered to pay the Petitioners their costs of the said application, and that the same might be ordered to be raised and paid by and out of the charity estate or the income thereof."

Upon the hearing of the petition before the Master of the Rolls, his Honor, after taking time to consider, came to the conclusion, that, upon the true construction of the scheme, a boy who was not born in the town or parish of *Wakefield*, but who had been at the school for three years next preceding the election, was not entitled to any preference over a boy who was born in the parish of *Wakefield* and had formerly been three years at the school, but was not at the school at the time of the election; and his Honor accordingly made an order

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dated 9th *July*, 1860, by which he ordered that the petition should stand dismissed, and that the Petitioners *William Astley Cave, Brown Cave and Thomas Whicher*, should pay to *John Stocks*, the guardian of the said infant *Joseph Westmoreland*, his costs of the petition, to be taxed by the Taxing Master; and that the costs of the said governors should be taxed by the Taxing Master, and should be retained by them out of the estate of the said charity.

The appeal we have now to decide is by the original Petitioners from this order. Since the hearing at the Rolls an affidavit has been filed on the part of the Appellants to explain the delay in presenting the petition. The explanation is in some respects sufficient, but it does not, I think, assign any sufficient reason for more early notice not having been given to the Respondent *Joseph Westmoreland* of the intention to dispute his election. Affidavits have also been filed on the part of the Respondents on the subject of this delay; amongst them there is an affidavit of the father of the Respondent *Joseph Westmoreland*, in which he states, that but for this exhibition being granted to his son, he should not have sent him to the university.

The first question in the case is, as to the construction of the scheme; and speaking of course with all respect to the Master of the Rolls, I find myself unable to agree with his Honor's opinion upon this point. According to the scheme, the exhibitors are to be elected from the boys "who shall have been" or, as it is expressed in some parts of the scheme, "who have been" three years at the school; and it seems to me that the words "who shall have been" or "who have been" must be taken in connection with the act to be done—the election to be made,—and must be read therefore as if the words had been,

been, "who at the time of the election shall have been or have been three years at the school." Now it may no doubt well be said of a boy who has left a school, that he has been three years at the school, if he has been there for three years at any time during the period of his education; but I do not think it can well be said of a boy that he has been three years at a school at a given time, unless he has been there for the three years immediately preceding that time. I think, therefore, that according to the true meaning of what may be called the operative part of the scheme, the boys to be elected were boys who had been three years at the school at the time of and immediately preceding the election; and both the context of the scheme and the instrument on which it proceeds seem to me to favor that construction. By another provision of the scheme, the surplus revenue is to accumulate, if there be no boys candidates for the charity from the free grammar school, which, in the absence of any clear intention to be deduced from the previous provisions, seems to me to import that the candidates were to be the boys of the school; and the will is, I think, even more distinct upon the point, for it says, that the boys are to be sent from the school.

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It was plausibly argued on the part of the Respondents, that the intention of the testator seems to have been rather to benefit the boys of the town or parish than to benefit the school, and that a wide construction, therefore, ought to be given to the words "who shall have been" or "who have been" so that all boys of the town or parish who had been three years at the school might be included before resorting to foreigners; and the Master of the Rolls seems, I think, to have favored this view. But this argument seems to me to apply rather to the propriety of the scheme than to the construction of it; and I do not think we should be justified in straining the

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words in order to meet this view, even assuming it to be correct; a question which is not before us. In my opinion, therefore, this order cannot be maintained on the grounds on which it was pronounced. It remains then to consider whether it can be maintained on other grounds. The petition asks that the Petitioner *Fitzherbert Astley Cave* may be declared to be entitled to the benefit of the exhibition. It is, I think, quite beyond our power to make any such declaration. By the constitution of the charity as settled by the scheme the election rests with the governors, and we cannot elect for them. But it is asked also that the election of the Respondent *Joseph Westmoreland* may be declared to be null and void, with directions for a new election and consequential relief; and this part of the case was much pressed in argument. I am of opinion, however, that under the circumstances of this case we should not be justified in acceding to this part of the prayer. I can see here no trace of mala fides on the part of the governors, unless it is to be inferred from the fact of their not having acted in conformity with the opinion of the Charity Commissioners; but that opinion, although it would have indemnified them had they acted upon it, was not, as I apprehend, binding upon them; and I cannot impute to them any mala fides in not having acted upon it when I find that the Master of the Rolls was of opinion that it was their duty not to do so. The case, therefore, stands free of any imputation of mala fides, and is reduced to this: that in our view of it the governors have acted upon a mistaken construction of the scheme; and I do not think that it is according to the course of the Court to remove objects of a charity who have been elected under a mistake, where the election has been made bonâ fide and without any fraud or corruption. I have not succeeded in finding so much authority on this point as I had expected, but the case of the

the *Attorney-General v. Hartley* (a), seems to me to bear strongly upon it, and the doctrine seems to me to derive much support from the cases in which it has been held that charity trustees are not to be charged with payments made upon a mistaken construction of doubtful instruments, for if the objects were to be removed, the trustees must, it would seem, be accountable for what they had paid to those objects. This Court exercises a wide discretion in its dealings with charity trustees, and looking to the public interest, has supported acts done under such trusts which in the case of a private trust could not be supported; and the case before us is peculiarly unfavourable to the exercise of the power of removal, having regard to the absence of notice to the Respondent *Westmoreland*, and to what is stated in his father's affidavit. The specific relief, therefore, which is prayed by this petition ought not, in my opinion, to be granted; but I think the petition should not have been dismissed. There should, I think, be an order upon it, declaring our opinion upon the construction of the scheme, and directing the trustees for the future to act accordingly.

There remains, then, only the question of costs. I have anxiously considered that subject. I think it of great importance in these cases of charity, on the one hand not to encourage frivolous applications to the Court, and on the other hand not to check applications to the Court where there is a bona fide ground for applying to it. I cannot say that in this case there was not such ground. No doubt private interests in this case are mixed up with the interests of the charity, but I think it would be going too far to say that we should visit with costs, or deprive of costs, parties who are induced to come here by their private interests. I fear we should rarely have applications to the Court for the

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benefit of charities were we to act on such a principle as that. On the whole, therefore, and after having very anxiously considered this subject, I think the right course is to direct the costs, both of the Petitioners and of the Respondent Mr. *Westmoreland* to be paid out of the charity funds.



*Nov. 13, 14.  
Dec. 18.*

*Before The  
Lord  
Chancellor  
Lord  
CAMPBELL.*

The fact that a trustee for sale by public auction or private contract has not promoted competition by asking one of two persons proposing to purchase by private contract to bid higher before closing with the rival bidder: *Held*, not to be a ground for setting aside or cancelling the contract.

The practice adopted at sales by auction under the decree of the Court, of opening the biddings after a sale, not to be extended to sales by trustees under a power of sale conferred upon them.

#### HARPER v. HAYES.

BY Indenture, dated the 28th *July*, 1842, property comprising minerals was conveyed to the use of *William Hayes*, a solicitor, his heirs and assigns, "upon trust, immediately or as soon as conveniently might be after the decease of the survivor of *Henry Hodgetts* and *Sarah* his wife, to make sale and absolutely convey and dispose of the same, together or in parcels, to any person or persons who should or might be willing to become the purchaser or purchasers thereof, or as he or they should direct, for the most money and best price or prices that could at the time of such sale or sales be reasonably had or gotten for the same, either by public auction or private contract, with liberty, if deemed expedient, to make any stipulations or conditions as to the evidence of title to be required by any purchaser or purchasers, and also to buy in the said hereditaments or any part thereof at any auction or auctions, and to rescind or vary the terms of any contract or contracts for sale that might have been entered into, and to convey such parts of the said hereditaments, as from time to time should be sold, in such manner as the purchaser or respective purchasers thereof should direct, and from time to time to make, do and execute all proper acts, deeds, contracts and assurances for carrying such sale or sales into complete effect. The deed then contained a declaration that the receipts of the said *William Hayes*, his heirs and assigns, should be

be good discharges, and that *Hayes* should stand possessed of the residue of the purchase monies (after payment of expenses) upon trust to divide the same into eight equal parts and distribute the same amongst the eight children of *Henry* and *Sarah Hodgetts* in manner therein mentioned.

*Henry Hodgetts* and *Sarah* his wife severally died in 1857, leaving their eight children, *cestuis que trust* under the above-mentioned indenture, surviving and having severally attained the age of twenty-one.

Shortly afterwards, the persons beneficially interested under the deed were let into possession of the trust premises by *Hayes* the trustee, and had ever since continued in such possession. In *January*, 1859, the persons so beneficially interested, by the advice of *Hayes*, agreed that a sale of the trust premises should be delayed in order that a defect in the title might be cured by lapse of time; but on the 1st of *February*, 1859, *Hayes*, having obtained the concurrence of all the *cestuis que trust*, offered to sell the estate to one *Pearson* for 6,000*l.*

On the 16th of *February*, 1859, *Harper*, the Plaintiff, purchased on behalf of himself and his partner the one-eighth share of the trust premises to which Mrs. *Chance*, one of the children of *Henry Hodgetts* and *Sarah* his wife, was beneficially entitled for 740*l.*, and on the same day, through his solicitor, gave a notice to *Hayes* forbidding him to complete his contract with *Pearson*, and offering 5,260*l.* for the purchase of the other seven-eighths of the trust premises.

On the 17th *February*, *Pearson* accepted unconditionally the offer which had been made to him by *Hayes*,

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Hayes, with the consent of the cestuis que trust; and by agreement of the 24th *March*, 1860, *Hayes*, notwithstanding the notice which had been served upon him on behalf of *Harper*, agreed to sell the premises to *Pearson*. Thereupon *Harper*, to whom Mrs. *Chance's* share in the premises had been conveyed to uses to bar dower, filed the bill in the present suit. It alleged that *Hayes* had not attempted to realise the full value of the trust estate by submitting the same to open competition, and offered 7,000*l.* for it. The prayer was that the trusts of the settlement of 1842 might be executed under the decree of the Court; that it might be declared that the agreement with *Pearson* of *March*, 1860, ought not to be carried into effect, and that the same might be delivered up to be cancelled.

Upon the hearing of the cause in *May*, 1860, Vice-Chancellor *Stuart*, by the decree appealed from, declared that, having regard to the circumstances in the pleadings mentioned, the agreement of the 24th *March*, 1860, was not binding and ought to be set aside; and directed a resale of the estate by public auction or private contract, the Plaintiff undertaking to give 7,000*l.* for the property upon the same terms as those contained in the agreement of *March*, 1860 (*a*).

From this decree the Defendants *Pearson* and *Hayes* appealed.

Mr. *Bacon* and Mr. *Renshaw*, for the Plaintiff.

It is admitted that *Hayes* was originally a trustee for sale, and had power to sell without the consent of the cestuis que trust. But by putting the trust property into the possession of the cestuis que trust, and by the arrangement with them postponing a sale, his power as trustee

(*a*) 2 *Giff.* 210—220.

trustee ceased to be unfettered. Thenceforth he acted as their solicitor and agent, not in his character of trustee, and could only sell with the consent of all. The sale, to be valid, should have been with the unanimous consent of all the cestuis que trust. Even as trustee, he was bound to obtain the best price that could be got for the premises, and for this purpose he should have obtained competition, either by putting the property up to auction, or by pressing *Pearson* and *Harper* to bid higher as private contractors; *Ord v. Noel* (a); *Mortlock v. Buller* (b).

Mr. *G. Osborne Morgan*, for four of the cestuis que trust and the husbands of two of them, was willing that the sale to *Pearson* should be carried out.

Mr. *Malins* and Mr. *W. R. Fisher*, for *Hayes* and three of the cestuis que trust.

One of several cestuis que trust is not allowed to interfere with a sale by a trustee for the benefit of all. A bill by one of several cestuis que trust to restrain the trustee from acting for all would be dismissed. The decree should have dismissed the bill as against *Hayes* with costs, instead of forbidding him to charge his costs against the trust estate.

The *Attorney-General* (Sir *Richard Bethell*), Mr. *Greene* and Mr. *Speed*, for *Pearson*, the purchaser.

The Plaintiff cannot be heard to assert that 6,000*l.* was an inadequate price for the whole estate, and yet that 740*l.* which he gave for Mrs. *Chance's* one-eighth share, was a proper price. The decree is inconsistent with the argument that the trust is at an end, and the bill moreover prays the execution of the trusts. The Plaintiff puts forward no equity, either by his allegations

or

(a) 5 *Madd.* 438.

(b) 10 *Ves.* 292.

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or by his proofs, but has been permitted to create an equity by offering 7,000*l.* by his bill: 6,000*l.* only had been offered by him prior to the filing of the bill, and that only contingently on the refusal of *Pearson* to give that sum. The purchase by the Plaintiff of Mrs. *Chance's* share was effected under pressure and most improperly. He can, at all events, be in no better position than Mrs. *Chance*; and a trustee, by acting under the direction of one of the *cestuis que trust* forbidding a sale, would lay himself open to risk; *Taylor v. Tabrum* (a). Fraud in procuring the agreement is neither alleged nor proved. There is therefore no case made for setting aside or cancelling the agreement. They cited also *Fletcher v. Ashburner* (b); *Trower v. Knightley* (c); *Deeth v. Hale* (d); *Taite v. Swinstead* (e).

Mr. *Bacon* replied.

Judgment reserved.

The LORD CHANCELLOR.

Dec. 18. I am of opinion, that the decree in this case can be supported only on the ground that the agreement of the 24th of *March*, 1860, between the Defendants *Hayes* and *Pearson*, was void, by showing that *Hayes* has misconducted himself as a trustee, in entering into that agreement, and that *Pearson* had written notice of his misconduct.

On the part of the Respondents, it is contended, that *Hayes* had let the *cestuis que trust* into possession, and had thereby denuded himself of all the power conferred upon

(a) 6 *Simp.* 281.

(c) 6 *Madd.* 134.

(b) 1 *Bro. C. C.* 497; *Amb.*

(d) 2 *Moll.* 317.

582.

(e) 26 *Beav.* 525.

upon him as trustee, except to execute a conveyance to a purchaser as they should direct. But I think that according to the evidence he merely allowed them to have the benefit of the rents till a sale should take place, still retaining all the power to sell and to divide the proceeds conferred upon him by the deed of 1842. Then it is said, that having obtained the express consent of all the eight cestuis que trust to sell to *Pearson*, for 6,000*l.*, his authority to do so was effectually revoked by *Harper*, the assignee, to whom one of the eight shares was sold, forbidding him to do so before he had entered into a binding contract to sell. But I do not assent to this doctrine, and the only solution of the difficulty attempted at the bar was, that in execution of the trust he ought to have sold seven-eighths of this mineral property to be held by the purchaser of the seven eighths, and the assignee of the remaining eighth as tenants in common. This sufficiently shows that the objection was untenable.

Assuming that *Hayes*, as trustee, retained the power to sell conferred upon him by the deed, the question arises whether he was guilty of a breach of trust by the manner in which he sold to *Pearson* for 6,000*l.*. Now I must say that this is not by any means made out to my satisfaction. I am inclined to think that there was not a binding contract of sale on the 17th of *February*, when *Pearson* first unconditionally accepted the offer which had been made to him with the consent of the cestuis que trust, as that offer was only to be in force for a week, which had then expired, and on the 16th of *February* there had been an offer from the Plaintiff *Harper*, who by this time had purchased Mrs. *Chance's* eighth, to give 6,000*l.* for the whole. It is urged that upon this offer *Hayes* was bound to put up the property to sale by public auction, or to stir up a further competition

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petition between *Pearson* and *Harper*. By the deed creating the power, *Hayes* was authorized to sell by private contract, or by auction, as to him should seem most expedient, and an attempt to sell this property by auction would have been most inexpedient, because there was a fatal flaw in the title, which an abstract must disclose, and which would be cured by lapse of time in six years, and the attention of bidders must have been attracted to this defect by a special condition in the articles of sale.

If the sale was to be by private contract, I do not know that it was imprudent to agree to *Pearson's* acceptance of the offer to sell to him for 6,000*l.* after the expiration of the week, although an offer of the same price had been made by *Harper*. The cestuis que trust had agreed that 6,000*l.* was a full price and as much as they could expect. No higher offer was made till the bill was filed, when the Plaintiffs said they were willing to give much more. On the 17th of *February*, *Hayes* had it in his power to secure the 6,000*l.* to the cestuis que trust, with which they had declared that they would be contented. There was nothing to bind *Harper* to his offer of 6,000*l.* Both *Harper* and *Pearson*, if his offer had not been accepted, might have resiled. The property, if afterwards sold either by public auction or private contract, might have fetched a smaller sum than 6,000*l.*, and in that event, according to the case of *Taylor v. Tabrum* (a), *Hayes*, having neglected the opportunity of selling for 6,000*l.*, would have been liable to the cestuis que trust for the deficiency.

The Vice-Chancellor seems to have been much influenced by the undertaking by *Harper*, when the cause stood

(a) 6 *Sim.* 281.

stood for hearing, to bid 7,000*l.* But I must say that I think the decree of the Court ought to be determined by the state of facts when the contract of sale was entered into between *Hayes* and *Pearson*, or, at any rate, when the bill was filed, and then there had been no offer above 6,000*l.*

If there be a sale by auction under the direction of the Court of Chancery, according to established practice, which I would not disturb, although I question the expediency of it, there may be an opening of the biddings after the sale. This practice is known to the bidders, and the highest bidder at the sale has no cause to complain if he loses his bargain by a higher offer being subsequently made and accepted. But it never has been supposed that this practice can be extended to a sale by a trustee under a power of selling conferred upon him.

Suppose, however, that *Hayes* was to blame in not asking *Harper* whether he would not raise his offer above 6,000*l.*, or in not, before closing with *Pearson*, making an effort to induce him to bid higher, there being a rival in the field, so that possibly a higher price might have been obtained, although this might be a good reason for a Court of Equity withholding its aid from the purchaser and refusing a decree for a specific performance, is this a sufficient ground for a decree that the agreement shall be delivered up to be cancelled? *Ord v. Noel*(*a*), relied on by the Vice-Chancellor, was a bill for a specific performance, and the point stated to have been decided was, that "if the act of sale by trustees takes place under circumstances which amount to a breach of trust, this Court will not specifically perform the contract."

Unless

(*a*) 5 *Madd.* 438.

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Unless the agreement for the sale of land is tainted by fraud, in which case it may be properly set aside, although a Court of Equity may refuse specific performance, not entirely approving of the transaction of sale, the purchaser is referred to his legal remedy. The Vice-Chancellor, in this case, when objection was made by Mr. *Greene*, counsel for *Pearson*, to the cancellation of the agreement, is represented to have said, "I cannot think, in a case of this kind, there is anything to induce the Court to consider that any damages would be recovered by your client against Mr. *Hayes* on this contract. So far from it, I have rather a contrary impression." But unless there was fraud of some sort on the part of the purchaser, I apprehend that this was a question not for the Equity Judge, but for the jury under the direction of the Common Law Judge who might try the action. Now it is admitted that *Pearson* conducted himself with the most perfect good faith down to the time when, on the 17th of *February*, he expressed his acceptance of the offer to purchase for 6,000*l.*, and the imputation against him is merely that he proceeded with the purchase and signed the formal agreement on the 24th of *March*, after he had notice of *Harper* having become assignee of Mrs. *Chance's* eighth, and having desired *Hayes* to delay the sale, and of *Harper* having himself offered 6,000*l.* I have already given my opinion that this countermand by *Harper* was inoperative as to the power of *Hayes* to sell, and I think that the notice of it did not disqualify *Pearson* as a purchaser.

I am therefore relieved from animadverting on the very improper manner in which Mrs. *Chance* was hurried into the sale of her share, and upon the indecorous proceeding of *Harper*, having purchased her share at the rate of less than 6,000*l.*, immediately after asserting by his

his bill that the property was worth much more than 6,000*l.*

According to my view of the facts proved and of the principles by which this Court is governed in such cases, I am bound to adjudge that the bill be dismissed with costs.

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HARPER*v.*HAYES.LEGG *v.* MACKRELL.

THIS was an appeal of the Defendant from the decision of Vice-Chancellor *Stuart*, on the ground, among others, that it only allowed the Defendant 10*l.* in respect of her costs of the suit.

John Morton Gray, by his will, bequeathed his personal estate to *Henry Mackrell* in trust, as to one-sixth part thereof, for the testator's daughter, the Plaintiff, for life, for her separate use, without power of anticipation; and after her decease upon trusts for her children. After the death of the testator, *Henry Mackrell* invested one sixth of his personal estate in the purchase of 287*l.* Reduced Bank Annuities in his own name, and died in *May*, 1856, having appointed the Defendant, his widow, sole executrix, who duly proved his will. In *June*, 1858, she was applied to, on behalf of the Plaintiff, to receive the dividends of the sum of 287*l.* stock from *October*, 1856. The Plaintiff was a married woman, and then in *Australia*. It appeared that *Henry Mackrell* had given one *Swayne* a power of attorney to receive the dividends, and that *Swayne* had paid the *October* dividend of 1856 to the Plaintiff; but that after receiving the dividend of *April*, 1857, he became aware of the death of *Henry Mackrell*, and declined paying that dividend to her.

*Dec. 17, 18.*Before The
Lord
Chancellor
LORD
CAMPBELL.

The executrix of a deceased and sole trustee having declined to receive and pay the dividends of a sum of stock left standing in the name of the trustee, the cestui que trust filed a bill against her for the appointment of new trustees, a transfer of the trust fund and payment of a dividend. Held, that the executrix was entitled to her costs out of the fund.

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The Defendant declined to act in the matter, and thereupon the Plaintiff filed the bill in this suit against the Defendant, as the executrix of *Henry Mackrell*, praying that the trust fund might be secured, a new trustee appointed, and that the Defendant might pay the costs of suit.

The Vice-Chancellor, by the decree under appeal, ordered the Defendant to pay the fund into Court, to receive the dividends from *October, 1856*, and to pay them into Court, and directed that 10*l.* out of the fund should be paid to the Defendant for costs (a). The ground of the decision was, that the Defendant might have relieved herself from responsibility by transferring the fund into Court under the Trustee Relief Act.

The Defendant on going to the Bank to receive the dividends became, for the first time, aware that the *April* dividend had been received, and she then applied to the Plaintiff to have the decree altered by inserting *April, 1857*, instead of *October, 1856*; but the Plaintiff declined unless the Defendant would pay also the *April* dividend of 1857.

The Defendant refused to do any act, except in obedience to the order of the Court, and the Plaintiff then threatened to attach the Defendant.

The Defendant thereupon appealed against the decree.

Mr. *Sandys*, for the Plaintiff, in support of the Vice-Chancellor's decree, submitted that the Defendant ought to have received or paid the dividends, or if she wished to relieve herself from the trust ought to have transferred

(a) See *Legg v. Mackrell*, 1 *Giff.* 165.

ferred the fund into Court under the Trustee Relief Act, and that as she had occasioned the suit, she ought not to be allowed any costs in it.

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*Mr. Schomberg and Mr. Hingeston* for the Defendant.

The Defendant has not occasioned the suit, as none was necessary, it having been in the Plaintiff's power to obtain all she required by a petition under the Trustee Act, 1850.

They cited *Menzies v. Connor* (a); *Greenwood v. Wakeford* (b); *Aldridge v. Westbrook* (c); *Thomas v. Walker* (d); *Gardner v. Downes* (e).

*Mr. Sandys* replied.

*The LORD CHANCELLOR.*

The Defendant in this case had a perfect right to decline acting in the trusts of the will, and she does not appear to have done anything of which the Plaintiff can complain.

The Plaintiff might have obtained all that she required under the Trustee Act, 1850, but she has thought fit, instead of applying under that Act, to file a bill against the Defendant. That being so, I think the Defendant entitled to her full costs, both in the Court of the Vice-Chancellor and on the appeal.

Order accordingly, the Defendant undertaking to do all she can to enable the Plaintiff to receive the *April* dividend of 1857, but she not thereby to be considered as doing any act as trustee of the trust fund.

(a) 3 *Mac. & G.* 648.

(d) 18 *Beav.* 521.

(b) 1 *Beav.* 576.

(e) 22 *Beav.* 395.

(c) 4 *Beav.* 212.

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P P

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In the Matter of ANNE JANE JONES, a Lunatic,
 and

In the Matter of the TRUSTEE ACT, 1850.

Dec. 21.

Before *The
 LORDS JUS-
 TICES.*

On a mortgage being paid off, the costs of obtaining a vesting order, rendered necessary by the lunacy of the heir-at-law of the mortgagee, were ordered to be paid by the mortgagor.

IN 1820, certain lands were mortgaged to *Jane Jones* in fee. The equity of redemption was subsequently devised to trustees during the lives of the Petitioner and two other persons, and the survivors and survivor of them, in trust for the Petitioner and the two others in equal shares during their joint lives, and after the decease of the one who should first die, then for the survivors in equal shares, with divers remainders over.

The mortgagee died intestate as to real estate, leaving the lunatic her heiress at law.

One of the equitable tenants for life paid to the executor of the mortgagee the money due on the mortgage, and presented a petition for an order vesting in herself the legal estate, subject to such equity of redemption as was subsisting therein in favor of the other persons beneficially interested.

Mr. *Wolstenholme*, for the Petitioner, asked that the costs of the application might be ordered to be paid by the executor out of the mortgage debts. He referred to *Ex parte Pearse* (a); *Re Lewes* (b), and *Re Wheeler* (c).

Mr.

(a) *T. & R.* 325.

(b) *1 Mac. & G.* 23.

(c) *1 De G., M. & G.* 434.

Mr. C. T. Simpson, for the executor, referred to *King v. Smith* (a); *Ex parte Clay* (b), and *Re Stuart* (c).

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Their LORDSHIPS made the vesting order as prayed, but ordered the Petitioner to pay to the executor of the mortgagee, and the committee of the lunatic heiress at law, their costs of the application and consequent thereon.

(a) 6 *Hare*, 473. (c) 4 *De G. & J.* 317.
(b) *Shelford, Lunacy*, p. 510 (2nd edit.)

THOMAS v. GRIFFITH.

Nov. 22.
Dec. 5, 21.
Before The
Lord
Chancellor
LORD
CAMPBELL
and The
LORDS JUS-
TICES.

THE bill in this case was filed to recover from the residuary devisees and legatees of *W. Griffith* certain monies claimed to have become due to the Plaintiff after the death of *W. Griffith*, in respect of transactions between him and the Plaintiff.

T. and *G.*
were partners
in building an
hotel. *G.*
bought the
share of *T.*,
who had con-
ducted the
building, and
agreed to pay
be

all the expenses. *G.* died, and at his death 356*l.* was due from him to *T.* in respect of bills which *T.* had paid for the building. A decree was made to administer *G.*'s estate. *T.* carried in a proof for the 356*l.* along with 82*l.* which he had paid since *G.*'s death. The 356*l.* was allowed and paid, the 82*l.* disallowed, and the estate was distributed. After this *T.* was obliged to pay further bills for the building, and filed a bill against the residuary legatees and devisees of *G.* to recover these sums and the 82*l.*

Held, by the whole Court, that the suit was maintainable as regarded the sums paid since the certificate.

Held, by the Lords Justices, the Lord Chancellor doubting, that it not appearing on what ground the 82*l.* had been disallowed, the Plaintiff had not lost his rights as to that sum.

Held, that the executor was not a necessary party to the suit.

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be entitled to the property and contribute to the expenses in equal shares; but *Griffith* subsequently purchased the Plaintiff's interest, undertaking to bear the whole of the liabilities. The Plaintiff, who was a builder, erected the hotel, and at the death of *Griffith*, which took place in June, 1855, the sum of 356*l.* 9*s.* 3*d.* was owing to the Plaintiff from him in respect of monies paid by the Plaintiff.

On the 4th of August, 1855, an order was made on a claim for the administration of *Griffith's* estate, at the suit of persons beneficially interested under his will. The order contained the usual direction to take "an account of the testator's debts." The Plaintiff carried in under the decree a claim for the 356*l.* 9*s.* 3*d.*, and afterwards for the further sum of 82*l.* 10*s.* 3*½d.* alleged by the Plaintiff to have become due since the testator's death in respect of monies paid by the Plaintiff for work done in completing the hotel. The Chief Clerk allowed the 356*l.* 9*s.* 3*d.*, but disallowed the 82*l.* 10*s.* 3*½d.*. A certificate was made accordingly, the cause was heard for further consideration and the estate of *Griffith* was distributed, the Plaintiff receiving the 356*l.* 9*s.* 3*d.*

After this the Plaintiff was obliged, as he alleged, to pay further sums amounting to 183*l.* 13*s.* 8*d.* in respect of the work done to the hotel, and he now filed his bill against the residuary devisees and legatees to recover the 82*l.* 10*s.* 3*½d.* and the 183*l.* 10*s.* 8*d.* without making the executor a party. Vice-Chancellor *Stuart* made a decree directing an account of what was due to the Plaintiff from the estate of the testator *William Griffith*, in respect of the agreements in the bill mentioned, reserving further consideration. The Defendants appealed.

Mr.

Mr. *Bacon* and Mr. *Osborne Morgan*, in support of the decree.

There has not been any adjudication such as to bind us as to the 82*l.* Only debts due at the testator's death could be proved under the decree; *Sterndale v. Han-kinson* (*a*). If a creditor does not go in under a decree he may file a bill of his own, as appears from the authorities cited in *Daniell's Chancery Practice* (*b*). Even a creditor who has gone in and failed is not precluded from filing a bill; *Davis v. Combermere* (*c*); *Teed v. Beere* (*d*); though no doubt if a creditor does not show a good reason for not having gone in he will be put under severe terms. At all events as to the sums paid since the certificate there is no bar whatever. It would be monstrous to hold that a creditor to whom 10*l.* was due and who did not think it worth while to go in under the decree should thereby lose his right in respect of large sums which he was afterwards compelled to pay. The objection has been taken that the executor ought to have been a party—

[Mr. *Malins*, for the Defendants, stated that this objection, though raised on the pleadings, had never been pressed, and that the Defendants did not insist upon it. The Court intimated an opinion that it could not be sustained.]

Mr. *Malins* and Mr. *Charles Hall*, for the Defendants.

Courts of Equity discourage laches, and the Plaintiff who must have known what he had expended has no reasonable excuse for not having brought in his whole claim under the decree in the other suit. As to the 82*l.* that

(*a*) 1 *Sim.* 393, 395.

(*c*) 15 *Sim.* 394.

(*b*) *Page* 1158 (2*nd* edit.).

(*d*) 7 *Weekly Rep.* 394.

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that is res judicata. With respect to the rest we do not dispute the general rule that a person not going in under a decree does not finally lose his rights; *David v. Froud* (a); but where there has been wilful default in not going in the case may be otherwise; *Sawyer v. Birchmore* (b). Here *Thomas*, if he had any claim at all, was a creditor, not a person having merely a contingent claim, for the hotel had been finished long before *Griffith's* death, and so all the bills were due in his lifetime. The demand, therefore, might have been carried in under the decree and must have been allowed. We resist it because we believe that in fact *Griffith* paid *Thomas*, though no evidence of this can now be found. [The LORD CHANCELLOR: Could a debt becoming due between the decree and the certificate be allowed as a debt? It is difficult to say that the bulk of this demand was as regarded *Thomas* anything more than a liability.] Whether it was a debt in the strict sense of the word or not, there would have been no difficulty in getting it entered in the certificate as a demand for the satisfaction of which the Court would have provided before parting with the assets. The object of a suit by a residuary legatee is to ascertain the residue which belongs to the residuary legatees, and the Court will deal with demands of a much more uncertain nature than this; *Lockhart v. Hardy* (c).

Mr. Morgan in reply.

The stat. 13 & 14 Vict. c. 35, s. 19, draws a distinction between debts and liabilities; *Seton on Decrees* (d). The certificate must follow the decree, which only directs an account of debts, not of liabilities.

Gillespie

(a) 1 M. & K. 200, 209.

(b) 1 Keen, 391, 825.

(c) 5 Beav. 305.

(d) Page 69 (2nd edit.)

Gillespie v. Alexander (a); Purcell v. Manning (b); King v. Malcott (c); Barrett v. Blake (d), were also referred to.

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Judgment reserved.

*The LORD CHANCELLOR.*

I never entertained any doubt that for the sums of money claimed as having become due to the Plaintiff from the estate of *William Griffith* since the report in the administration suit, this bill might be maintained. These sums the Plaintiff did not, and could not, claim in the administration suit.

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But as to the 82*l.* 10*s.* 3*½d.*, I must confess that I was strongly inclined to think that the adverse decision in the administration suit was a bar. Although this item was not a debt due to the Plaintiff at the death of the testator, it had become a liquidated demand due to the Plaintiff from the testator's estate before the report; it might well be considered "a debt of the testator" according to the terms of the decree; the practice appears to be to admit such a demand under such a decree; and this practice I consider is calculated to avoid delay and to save expense. There can be no doubt that the Chief Clerk might have included the 82*l.* 10*s.* 3*½d.*, in the report as a debt of the testator, and the Plaintiff might have applied to the Vice-Chancellor to have the certificate of the Chief Clerk amended by inserting this sum. I conceived, therefore, that the Plaintiff's remedy was

(a) 3 *Russ.* 130.

(b) 3 *Jur.*, N. S. 1070.

(c) 9 *Hare*, 692.

(d) 2 *Ball & B.* 354.

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was to apply to the Vice-Chancellor for this purpose, instead of submitting to the decision against him, allowing the executors to be discharged, and filing this bill to follow the assets in the hands of the legatees. The Plaintiff now seeks to recover other sums, but I apprehend he cannot include the sum disallowed in the administration suit, unless he could have supported a bill confined to the 82*l.* 10*s.* 3*½d.* Some reference was made to the ground on which the claim had been disallowed in the administration suit, but if there has been an adjudication by a Court of competent jurisdiction to decide in favor of the Plaintiff, whatever the ratio decidendi alleged may be, the decision seems to make it res judicata, and the proper remedy seems to be by appeal.

I should have been afraid to establish a precedent which may be perverted to litigious purposes.

But my brother Judges, the Lords Justices, take a different view of the subject, and the reasons and authorities for their opinion, which they have been good enough to communicate to me, are such as although hardly sufficient entirely to remove my doubts, induce me to refrain from saying that I dissent from the judgment of the Court which they think ought to be pronounced.

*The LORD JUSTICE KNIGHT BRUCE.*

I concur in the view which the Vice-Chancellor has taken of this case; and the decree which has been made appears to me right, both in form and substance, except that it would I think be more correct that the account directed to be taken should be an account of what, *if anything*, is due to the Plaintiff from the estate of

*William*

*William Griffith* in respect of the agreements. This addition will not make any difference as to the costs of the appeal, which ought, in my opinion, to be paid by the Appellants.

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*The Lord Justice Turner.*

This is an appeal from a decree of Vice-Chancellor Sir *John Stuart*, by which he has directed an account to be taken of what is due to the Plaintiff from the estate of *William Griffith*, in respect of the agreement in the bill mentioned.

The bill on which this decree is founded is filed by *Owen Thomas* against the residuary devisees and legatees and legatees of *William Griffith* for the purpose of recovering a debt claimed to be due to the Plaintiff from the estate of *William Griffith*. It appears that in the year 1855 the residuary devisees and legatees of *William Thomas*, who are the Defendants in this suit, themselves filed a bill in this Court for the administration of *William Griffith's* estate, and that on the 4th of August, 1855, the usual decree was made in that suit, which, upon referring to *Reg. Lib. (a)*, appears to have contained a direction to take "an account of the testator's debts."

*Owen Thomas*, the Plaintiff in this suit, went in as a creditor under this decree, and claimed in the first instance the sum of 356*l.* 9*s.* 3*d.*, and afterwards the further sum of 82*l.* 10*s.* 3*½d.* as being due to him. He proved the sum of 356*l.* 9*s.* 3*d.* to have been due to him at the death of *William Griffith*, and that sum was allowed as a debt, and was paid to him under the decree, but the further sum of 82*l.* 10*s.* 3*½d.*, which it appears he claimed

(a) *Griffith v. Titley, Reg. Lib. A. 1854, fol. 1449.*

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claimed as having become due to him after the death of *William Griffith*, and indeed after the date of the decree, was not allowed to him. He has accordingly filed this bill for the purpose of recovering it and other sums which he alleges to have become due to him from the estate of *William Griffith* after the date of the report in the former suit, and, having given at least *prima facie* evidence of the debts, he has obtained from the Vice-Chancellor the foregoing decree.

That this decree is right both in form and substance subject only to the introduction of the words "if anything," so that the account may be of what, if anything, is due, an introduction the propriety of which was not disputed, seems to me to be beyond all question, for the proceedings in the former suit certainly could not protect the residuary devisees and legatees from being called upon to pay debts which became due after the date of the report in that suit, and at all events therefore there was ground for the account. A question, however, of some importance was raised upon the argument of the appeal, which it may be convenient, although it is not necessary, for us now to dispose of—the question, whether the Plaintiff is precluded by the proceedings in the former suit from now claiming the 82*l.* 10*s.* 3*½d.*, which was disallowed in that suit.

I am of opinion that under the circumstances of this case he ought not to be held to be so precluded. There is not, as I apprehend, the least doubt that where under a decree in a suit against an executor, whether under the old or the new practice, a debt has been claimed to be due from the estate of the testator, and the claim has been fully investigated and disallowed, the alleged creditor cannot afterwards maintain a suit to enforce the claim against the residuary devisees or legatees. In such cases  
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the rule of res judicata must apply, but I am not satisfied that the rule reaches so far as to apply to cases under the old practice where the debt claimed was not due at the death of the testator, for it seems to me at least open to doubt, whether the old practice was not that only creditors whose debts were due at the death of the testator should be permitted to come in under the decree. I mean of course in cases where the claim was opposed and the strict practice insisted upon, which would not generally be the case, it being in most cases for the interest of the parties that the creditors should be permitted to come in and the expenses of a further suit be avoided. Sir A. Hart, who had very great experience in this Court, seems to have considered in *Sterndale v. Hankinson* (*a*), that this was the practice, and I have ascertained, by reference to the registrar's book, that the decree in that case was in the common form for an account of what was due to the Plaintiff and the other creditors of the testator, not confining it in terms to the creditors at the time of the testator's decease. I appear also to have understood this to have been the practice when I decided the case of *King v. Malcot* (*b*), and it seems to have been so understood at least so far as I was concerned when the special case act was prepared. It is to be observed too, in support of the view of this having been the practice, that where in a creditors' suit the decree was founded on an admission of the debt the admission as stated in *Seton's Decrees* was that the testator was, at the time of his decease, indebted to the Plaintiff, and that in the forms of claims and affidavits by creditors in support of claims to come in under decrees the allegation also in general was that the debt was due at the death of the testator. I find it to have been so in

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(*a*) 1 *Sim.* 393.

(*b*) 9 *Hare*, 692.

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an old edition of *Harrison's Practice* (a); in *Grant's Practice* (b); in *Turner and Venable's Practice* (c); in *Newland's Practice* (d), and later in *Smith's Practice* (e), and the practice does not seem to me to have been without some foundation in reason. According to the old course the account of debts was taken by the Masters. They had no power to impose conditions upon creditors coming in under the decree, and in cases of debts becoming due after the death, it might be necessary that conditions should be imposed, and nice and difficult questions, more proper to be decided by the Court than by the Master, might arise. It seems, however, that whatever may have been the old practice, the practice now is to admit all creditors to come in under the decree whose debts have become due before the date of the report, and I am by no means disposed to question the expediency of this alteration, if alteration it be, in the practice. I think that it is well calculated to save expense and to benefit the suitors, and that it is attended with no danger, as all the proceedings are now under the immediate supervision of the judge. I should not hesitate therefore to hold that any claim, whether ripened into debt before or after the death of the testator, could not be made the foundation of a future suit, where it appeared that the merits of the claim had been entered into; but I think that, having regard to what may and would appear to have been, a change in practice, some latitude ought to be given in the introduction of the different practice, and the Court ought to be satisfied that the case was dealt with under the new practice and the merits fully entered into. In a case very similar to the present, *Barker v. Rogers* (f),

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| (a) 1790, vol. 2, p. 36.                  | (d) Vol. 2, p. 238. |
| (b) Vol. 2, p. 333.                       | (e) Page 564.       |
| (c) Vol. 1, p. 757, and Vol. 2,<br>p. 90. | (f) 7 Hare, 19.     |

the Vice-Chancellor *Wigram* took this course,—he saw the Master, and having ascertained that the claim in the first suit had not been disposed of upon the merits, he entertained the further suit, observing that it would be going too far to hold that the alleged creditor had lost his right by not having appealed to the Court from the Master's decision. In this case the Chief Clerk of the Master of the Rolls, by whom the case appears to have been disposed of, has told us that he cannot state on what ground the claim was rejected. The Plaintiff might and ought perhaps to have insisted that the case should be heard before the judge himself, which every suitor has a right to insist upon, but I think we may well follow the decision in *Barker v. Rogers*, and hold that the claim is not wholly barred in consequence of his not having done so, whatever may be the effect as to costs, which will be in the judgment of the Vice-Chancellor on further consideration.

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Assets of a testator, consisting of personality which could be identified, were settled bona fide upon the marriage of his daughter and residuary legatee. Held, that they thereupon ceased to be liable to subsequently accruing claims in respect of breaches of covenants which had been entered into by the testator but of which the parties to the settlement had no notice when they executed it.

The limitations and covenants in a marriage settlement are not severable as being in part only supported by the consideration of marriage, temble.

THIS was an appeal from the dismissal by Vice-Chancellor *Stuart* of the Plaintiff's bill with costs (a).

By indenture, dated the 28th *February*, 1822, *H. Hewitt* demised to *Charles Dilkes*, his executors, administrators and assigns, a stable, house and premises situate at *Cork*, for a term of 9,000 years, to be computed from the 29th *September* then last, at an annual rent of 53*l.*

The deed contained the usual covenants on the part of the lessee to pay the rent and keep the demised premises in repair.

By indenture, dated 31st *July*, 1828, *Charles Dilkes* in consideration of 100*l.* demised to *James Bucknell*, his executors, administrators and assigns, the hereditaments and premises comprised in the indenture of *February*, 1822, for a term of 8,000 years, to commence from the 25th *March* then last, at the annual rent of 53*l.*

The indenture contained the usual covenants on the part of *James Bucknell* to pay the rent, and to repair and keep in good tenable condition the premises thereby demised, with a proviso that it should be lawful for *James Bucknell*, his executors, administrators and assigns, during the continuance of the term, to pay the rent

(a) See *Dilkes v. Broadmead*, 2 *Giff.* 113.

rent of the demised premises as it became due to *H. Hewitt*, under whom *Charles Dilkes* held the same, and that the receipts of *H. Hewitt*, his executors, administrators and assigns, should be deemed and taken by *Charles Dilkes*, his executors, administrators and assigns, to be good and valid discharges for such payments.

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Charles Dilkes died in *October, 1846*, intestate.

James Bucknell by his will, dated the 15th *June, 1829*, after giving certain pecuniary and specific legacies, gave and bequeathed all other his monies and securities for money, goods, chattels and personal estate, of what nature or kind soever, to his brother *William Bucknell*, upon trust, after giving thereout to his daughter *Harriett Bucknell* such articles as he might think proper to select for her, as soon as conveniently might be after his (the testator's) decease to convert the same into money and to invest the same on government or landed security in *England* or *Ireland* as he should think proper, and upon further trust, to receive and take the interest and dividends and annual proceeds of the trust monies, and pay so much thereof as he might think proper, in addition to the dividends and interest arising for the use of his (the testator's) said daughter under his marriage settlement, in and upon the maintenance, clothing and education of his said daughter until she should attain the age of twenty-four years, or be married under that age with his previous consent in writing; and as to all the rest, residue and remainder of such dividends, interest and proceeds which should not be applied as aforesaid, that his said brother should invest the same on such securities as before mentioned, and should pay and transfer and assign the said trust estate, with the accumulations thereof, to his said daughter, when she should attain the age of twenty-four years, or be married under

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under that age with the consent of his (the testator's) brother testified as before mentioned; and in case his said daughter should marry before she attained the age of twenty-four years without the previous consent in writing of his said brother *William*, in case he should be then living, or of any trustee or trustees, to be appointed as thereinafter mentioned, then upon such trusts as are in the will mentioned. And the testator declared that in case his daughter should marry under the age of twenty-four years with the consent of his said brother *William*, if he should be then living, or of any new trustee or trustees, to be appointed as thereinafter mentioned, then he empowered the person or persons giving such consent to join and concur in making any settlement, which he or they should deem proper, of all or any part of the said trust monies. The will then conferred on *W. Bucknell* the usual power to appoint new trustees.

James Bucknell died shortly afterwards.

In 1830, *W. Bucknell* assigned the under-lease of his testator in the stable and premises at *Cork* to *H. B. Wise*, who by the indenture of assignment entered into the usual covenants to pay the rent and keep the premises in repair. *H. B. Wise* thereupon entered into the premises assigned, and continued in the occupation thereof till his death in 1855, paying the rent during the whole of that period to *H. Hewitt*, the head landlord.

In 1848, *Harriet Bucknell* married *T. P. Broadmead*, with the consent of *W. Bucknell*, she being then under twenty-four years of age. Prior to and in contemplation of the marriage, mutual settlements were executed by Mr. and Mrs. *Broadmead*.

By the first of these, Mr. *Broadmead* joined his father

father and mother in charging real estates in *Somersetshire*, to which he was entitled in remainder in fee after their deaths, with the payment of an annuity to himself during the joint lives of himself and his father and mother, and in the event of his dying in his wife's lifetime with the payment of a like annuity to her during the joint lives of herself and Mr. *Broadmead*'s father and mother; and in limiting, after the deaths of his father and mother, life interests in succession in the premises charged to himself and Mrs. *Broadmead*, with remainder in fee to the children of the marriage.

By the other settlement made on the same day and dated 15th August, 1848, Mrs. *Broadmead* (then *Harriett Bucknell*) in consideration of the intended marriage and of two sums of 1,000*l.* cash, which had by treaty been previously paid to Mr. *Broadmead*, viz. one of such sums by his father and the other by herself, and in consideration of the settlement already stated made by Mr. *Broadmead* and his father and mother, settled the whole of her fortune, consisting of 18,957*l.* 16*s.* 6*d.* £3 : 5*s.* per Cent. Bank Annuities, upon trust, as to 12,500*l.* £3 : 5*s.* per Cent. Bank Annuities part thereof, for Mr. *Broadmead* for life, remainder to herself for life, and after the decease of the survivor to the children of the marriage as Mr. and Mrs. *Broadmead* should jointly appoint, and in default of appointment to the children equally; and upon trust, as to 6,497*l.* 16*s.* 6*d.* £3 : 5*s.* per Cent. Bank Annuities, being the residue of her said fortune, for herself during the joint lives of herself and husband for her separate use without power of anticipation, and on the death of such one of them as should first die, in case Mrs. *Broadmead* should survive her husband, for herself absolutely, but if she should die in the lifetime of Mr. *Broadmead*, then as she should by will appoint, and in default of appointment upon the same trusts in favor of

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the children of the marriage as had been thereby declared with respect to the sum of 12,500*l.* £3 : 5*s.* per Cent. Bank Annuities.

The precise part of the sums thus settled by Mrs. *Broadmead* which were derived from her father's estate did not appear upon the settlement; but it was admitted in the Defendant's answer that 5,689*l.* 5*s.* 2*d.* £3 : 5*s.* per Cent. Bank Annuities thereof was at least so derived.

Upon the death of *Wise* in 1855, his executor neither paid the rent of the premises assigned to his testator, nor kept them in repair, but to relieve himself and his testator's estate from liability under the lease assigned the demised premises over to a pauper.

Under these circumstances the Plaintiff, the personal representative of *Charles Dilkes*, who had died in 1846 intestate, instituted the present suit against Mr. and Mrs. *Broadmead* and the trustees of their marriage settlement, alleging by his bill that he had been obliged to pay 97*l.* 16*s.* 11*d.* for two years' rent accrued due since the death of *Wise* to the personal representative of *H. Hewitt*, the original lessor; that *William Bucknell*, the executor of *James Bucknell*, had possessed himself of all the estate of his testator and thereout paid all his debts, funeral and testamentary expenses, except that he had not provided or appropriated any reserve fund to answer any claim to which his testator's estate might become liable under the covenants of the lease of the 28th *February*, 1822, and had handed over the clear residue to Mr. and Mrs. *Broadmead*; that *William Bucknell* was since dead, and that there was no legal representative either of *William Bucknell* or of his testator *James Bucknell*.

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The bill prayed an account of what was due to the Plaintiff in respect of the rent which, under the circumstances above mentioned he had paid, and in respect of any breaches of the covenant to repair in the indenture of the 28th *February*, 1822, and that the Defendant *T. P. Broadmead* might be ordered personally to pay to the Plaintiff what on taking such account should be found due to him, or that such payment might be ordered to be made out of the funds comprised in the marriage settlement of Mr. and Mrs. *Broadmead*, or out of so much thereof as was settled to the separate use of Mrs. *Broadmead*, or out of such part of such settled funds as were derived from the estate of her father *James Bucknell* deceased. The bill also prayed that all proper directions might be given for securing out of the estate of the testator *James Bucknell*, or at all events out of such part thereof as was settled to the separate use of Mrs. *Broadmead*, the payment of the rent reserved by the indenture of the 28th *February*, 1822, and hereafter to become due, and the future performance of the covenants therein contained on the part of the testator *James Bucknell*, his executors, administrators and assigns; and lastly that the Defendants might admit assets received from the estate of *James Bucknell* sufficient for the purposes aforesaid, or that an account might be taken of the personal estate and effects of *James Bucknell* which had been paid, assigned or transferred to the Defendants or either of them.

Mr. *Bacon* and Mr. *Hingeston*, for the Plaintiff, in support of the appeal.

It is admitted, that, to the extent of 5,689*l.* £3 : 5*s.* per Cent. Bank Annuities, the settled fund was derived from the assets of the testator *James Bucknell*.

Mr. *Broadmead* must have known this at the time  
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when the settlement was made, and that, to this extent at all events, the settled fund was liable to the payment of the testator's debts. As regards personal estate, the creditor of a testator has a right to pursue the assets of his debtor into whatever hands they may have passed; *Gillespie v. Alexander* (a); *Greig v. Somerville* (b); *Davies v. Nicolson* (c); *Noble v. Brett* (d); *March v. Russell* (e); *Higgins v. Shaw* (f).

The debt of the testator is the debt of a legatee who has received assets. The cases of *Spackman v. Timbrell* (g); *Richardson v. Horton* (h) and *Pimm v. Insall* (i) have no bearing on the present question. Those cases proceeded on the statute of fraudulent devises and related to real estate, but have no application to personality. Mrs. *Broadmead*, having become possessed of assets of her father before the marriage, became, to that extent, liable to the payment of his debts; and that liability still remains, though she has parted with the assets. Upon her marriage her husband became liable to her personal debts and obligations; and it is submitted, that the Plaintiff's demand is a charge upon the general estate under settlement, or if not, at all events upon the 5,689*l.* part thereof derived from the testator's assets, and that the Plaintiff is also entitled to have the life interest of Mrs. *Broadmead* in the part of the fund settled to her separate use for life sold and applied in satisfaction of his claim. There has been no laches on the part of the Plaintiff. The rent was regularly paid till the death of *Wise* in 1855; and the Plaintiff was not entitled to require

(a) 3 Russ. 130.

(b) 1 Russ. & M. 338.

(c) 2 De G. & J. 693.

(d) 24 Beav. 499.

(e) 3 Myl. & Cr. 31.

(f) 1 Con. & Law. 400—403.

(g) 8 Sim. 253—260.

(h) 7 Beav. 112.

(i) 1 Mac. & G. 449.

require *William Bucknell* to impound part of the assets of his testator to answer future possible breaches of covenant in the lease granted to the testator; *King v. Malcott* (*a*). They cited also *Ridgway v. Newstead* (*b*).

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Mr. Malins and *Mr. Schomberg* for the Defendants.

The settlement in question takes the property settled out of the reach of the testator's creditors. The consideration of marriage is paramount to every other, and the trustees of the settlement were purchasers for value; *Campton v. Cotton* (*c*); *In re M'Burnie's Trust* (*d*); *Thorndike v. Hunt* (*e*). And this applies to personal estate settled as well as to real estate. *Spackman v. Timbrell* (*f*) embraced personal estate as well as realty. It was argued separately as to each description of property, and the Vice-Chancellor of *England* thought there was no ground of distinction. There has been no personal liability incurred by Mrs. *Broadmead*, by means of which her separate estate for life under the settlement can be reached. No part of the assets of her father ever became vested in her or was under her control. As soon as *William Bucknell*, in consideration of the settlement, consented to her marriage, the assets were handed over to the trustees of the settlement, who became purchasers for value.

Mr. Bacon replied.

The LORD CHANCELLOR.

From the close of the argument at the bar, I have been clearly of opinion that the decree appealed against ought

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| (<i>a</i>) 9 <i>Hare</i> , 692. | (<i>d</i>) 1 <i>De G., M. & G.</i> 441. |
| (<i>b</i>) 2 <i>Giff.</i> 492. | (<i>e</i>) 3 <i>De G. & J.</i> 563. |
| (<i>c</i>) 17 <i>Ves.</i> 263. | (<i>f</i>) 8 <i>Sim.</i> 253. |

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ought to be affirmed as far as it concerns the 12,500*l.* Bank Annuities settled on the husband for life with remainder among the children of the marriage. The marriage settlement was executed bona fide before the debt in respect of which the bill is filed had accrued, and without notice of the covenant, for breach of which the debt did accrue. This fund certainly was produced from the assets of the covenantor, and is sufficiently identified to give the Plaintiff a claim upon it, if the portion of his personal estate which it represents had not been bona fide alienated for valuable consideration to purchasers. But the husband and the children of the marriage appear to me to be such purchasers. *Spackman v. Timbrell* (*a*), and the other cases relied upon by the Vice-Chancellor, satisfactorily establish the doctrine, that assets of a deceased debtor or covenantor settled bona fide in consideration of marriage are no longer specifically liable to the claims of creditors, and where personal property can be identified, I do not think that, in reason, or according to the authorities, any distinction can be made for this purpose between personal property and real property.

There was, during the argument, some resort to a personal liability, irrespective of the liability of the assets; but none of the Defendants in this case are in the situation of an heir, who, after alienating the lands which came to him by descent, is sued in respect of the debt or covenant of his ancestor. The present Defendants can only be made liable by showing that assets of the covenantors are in their hands as volunteers.

Although the learned Vice-Chancellor considered it still more clear that the Plaintiff's claim could not be supported

(*a*) 8 *Sim.* 253.

supported in respect of the 6,497*l.* 16*s.* 6*d.* settled on the wife for her separate use during the lives of the husband and wife, remainder to herself absolutely in case she survived her husband, with power, in case she died in his lifetime, of appointing the fund by will, I must confess that I have entertained serious doubts whether, as to her interest in the 6,497*l.* 16*s.* 6*d.*, she might not be considered a volunteer. It may be argued that, great as is the efficacy given to marriage as a consideration, marriage may not necessarily be held to be the consideration for every part of every arrangement introduced into a marriage settlement. If Mrs. *Broadmead* had reached the age of twenty-four without marrying, she would then have been entitled absolutely to the whole of the personal estate of her father. Suppose that she had afterwards married, and by an ante-nuptial deed she had settled 1,000*l.* of her father's assets on her husband and the children of the marriage, and had reserved all the residue of his assets for her sole and separate use, with a power to dispose of this residue as she should think fit, it might be argued, that while the husband and children would take the 1,000*l.* as purchasers, exempt from any claim of the creditors of the covenantor, she would take the residue as a volunteer. No interest in the residue being communicated to the husband or the children, or any one else, the whole would seem to remain in her. She could not be a purchaser from herself, and, quoad the residue, the children could hardly be considered purchasers.

Although the marriage took place before she reached the age of twenty-four, it was with the consent of her uncle, and marrying with such consent, she was entitled to the whole of the personality of her father, to be settled as she pleased when the marriage took place.

If there had been such a settlement after twenty-four
as

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as I have supposed, and the wife had survived her husband, the residue of her father's assets being still specifically in her hands,—must they be supposed to have changed their quality by the settlement? And would they not be liable to her father's creditors, as they certainly would have been had she remained a feme sole. If she might be sued by the creditors when a widow, there is difficulty in saying that she and her husband might not be sued by the creditors pro tanto during the coverture. However, I do not find any authority for severing any of the limitations or covenants in a marriage settlement, which substantially form part of the contract entered into between those who execute the deed, and for holding that they shall not all operate as being supported by the consideration of marriage. Much peril might arise if sanction were given to such an attempt. In this case the settlement of the 6,497*l.* 16*s.* 6*d.* to the wife's separate use, without power of anticipation, may have been an inducement to the husband to agree to the marriage. He derives advantage from the 6,497*l.* 16*s.* 6*d.* settled to the separate use of the wife. He is relieved from the provision he might otherwise have been required to make for her by way of pin money. Her equity to a settlement out of property coming to her aliunde during the coverture is pro tanto diminished; and his own right to it is proportionably increased. Although it is true that she has the power to exclude him from participating in the interest of the 6,497*l.* 16*s.* 6*d.*, he had a right to calculate on living amicably with his wife, in which case her income would contribute to the expenditure which would otherwise fall upon him exclusively. Says Lord Cottenham, “In ninety-nine cases out of a hundred, separate property, which is introduced as a protection to the wife, does not take effect. All things going right, and no distinction being made, the question of separate property does not arise; the property is used as a common fund for

for the benefit of the family, and in that way naturally falls under the control and management of the husband;" *Caton v. Rideout* (a). Then Mr. *Broadmead* would be aware that even if he became bankrupt, his wife would always be kept from destitution, and have the means of making some provision for their children. Regard may likewise be had to the contingent trusts in favor of the children in the event of the wife dying in the lifetime of the husband, though liable to be defeated by her exercising her power of appointment. If the marriage had taken place after she had attained twenty-four, without any settlement, the husband would clearly have been a purchaser as to all the personal estate of the covenantor, and I cannot say that he does not derive a benefit from the manner in which the sum of 6,497*l.* 16*s.* 6*d.* is settled, sufficient to prevent this from being a mere voluntary settlement for the benefit of the wife.

The result is, that the fund cannot now be followed by the creditors of her father, and I have the great satisfaction which I always feel when I can affirm the decree appealed from without any variation.

The appeal must be dismissed with costs.

(a) 1 *Mac. & G.* 599—603.

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~~~*Dec. 12, 22.*Before *The  
LORDS JUS-
TICES.*

A solicitor borrowed money from a client upon a mortgage of two properties, *A.* and *B.*, and handed over to him a quantity of title deeds in a parcel bearing a label stating it to contain the deeds relating to both properties. It in fact contained only the deeds relating to property *A.*; but the client, relying on the solicitor, never opened it. Shortly afterwards the solicitor sold property *B.* to the Defendant, who completed his purchase without any notice of the mortgage, and upon completion the title deeds were handed over to him. Several years afterwards the solicitor absconded, and the mortgagee then for the first time discovered that the deeds had not been delivered to him, and that the purchaser claimed a title to the property. *Held,* that the mortgagee had not been guilty of such negligence as to postpone his title to that of the purchaser.

A decree for foreclosure being made against the purchaser, at the suit of the mortgagee, who was a mortgagee only for a term, *held,* that the purchaser ought not to be directed to deliver up the deeds to the mortgagee.

HUNT v. ELMES.

THIS was an appeal by the Defendant *Elmes* from a decree of the Master of the Rolls in a foreclosure suit, the contention of the Defendant being, that the Plaintiff, who was a mortgagee and had the legal estate, had no title as against the Appellant, a subsequent purchaser, on the ground of gross negligence in not obtaining possession of the title deeds.

In January, 1855, *David Hughes*, who was the solicitor of the Plaintiff, received, on behalf of the Plaintiff, a sum of 300*l.*, which was paid off by a mortgagor. *Hughes*, about the time of receiving this money, represented to the Plaintiff, that he could invest money for him at 5*l.* per cent.

The Plaintiff accordingly in April, 1855, placed 700*l.* more in *Hughes's* hands to be invested. *Hughes* retained the money to his own use, and in June executed to the Plaintiff a mortgage dated the 30th of April, 1855, for securing this sum.

By this mortgage deed *Hughes* demised to the Plaintiff certain leasehold property in *Newman Street, Marylebone,*

lebone, and certain freehold property at *Maryland Point, Stratford*, in *Essex*, to which latter property *Hughes* was entitled in fee. The deed was duly registered in *Middlesex* in June, 1855. It comprised also an assignment of a reversionary interest in two sums of stock.

Soon after this registration, *Hughes* sent to the Plaintiff a bundle of deeds in a parcel labelled as follows:—

“Deeds and mortgage by demise of certain premises, being No. 87, *Newman Street, Oxford Street, Middlesex*, for the remainder of a term of 99 years from Lady day, 1761, with covenant for renewal of the term every twenty-one years, and of five messuages at *Maryland Point, Stratford, Essex*, for ninety years, and assignment of reversionary interest in two sums of stock, for securing 1,000*l.* and interest at 5*l.* per cent.”

The Plaintiff placed entire confidence in *Hughes* and never looked into the parcel to see what it contained. It did not in fact contain any deeds relating to the property at *Maryland Point*, except the mortgage deed. The Plaintiff was not aware that *Hughes* was the mortgagor, and laid the parcel by, believing that *Hughes* had found him a proper security for his money from some other person, and taking it for granted that the parcel contained all the documents which he ought to have.

On the 6th of September, 1855, *Hughes* put up the *Maryland Point* property for sale by auction. It was not then sold, but on the 13th of the same month the Defendant became the purchaser by private contract. An abstract of title was delivered not noticing the mortgage to the Plaintiff. The Defendant employed a separate solicitor, the abstract was perused by counsel on behalf

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behalf of the Defendant, and every usual precaution was taken. On the 18th of *October*, 1855, the Defendant completed his purchase and took his conveyance, paid the purchase-money, 675*l.*, to *Hughes*, and received the title deeds relating to the property. He then took possession and expended about 1,300*l.* in completing unfinished houses on the property, and remained in quiet enjoyment without notice of any adverse claim until *July*, 1858.

*Hughes* continued to pay interest on the 1,000*l.* to the Plaintiff till *Christmas*, 1857, inclusive. On the 20th of *July*, 1858, he absconded, up to which time the Plaintiff had never examined the deeds. On the 27th the Plaintiff served the tenants of the *Maryland Point* property with notice to pay their rents to himself, and then discovered the title of the Defendant. On the 26th of *January*, 1859, he filed his bill for foreclosure. The rest of the property comprised in his security was estimated as worth about 300*l.* Evidence was adduced by the Defendant with the view of proving that the Plaintiff had notice of the property being put up for sale in *September*, 1855, but did not succeed in establishing this point; so the case wholly turned upon the question whether the Plaintiff had, by leaving the deeds in the possession of *Hughes* under the above circumstances, been guilty of such gross negligence as to deprive him of his rights as against the Defendant, who, as it was not disputed, had purchased bona fide, and, though taking every reasonable precaution, had discovered nothing to lead him to any suspicion of the existence of the incumbrance on the property.

The Master of the Rolls made the usual decree for foreclosure, from which the Defendant now appealed. It was agreed that the case should be treated as if the Defendant

Defendant had filed a cross bill to impeach the Plaintiff's security, admitting the legal estate to be effectually passed to the Plaintiff.

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Mr. *Roundell Palmer* and Mr. *Clement Swanston*, for the Plaintiff, in support of the decree.

The Plaintiff has the legal estate, and can only be deprived of the benefit of it as against the subsequent equitable title by fraud or gross negligence. Fraud is not imputed, and the Plaintiff having received from his solicitor an assurance that the deeds were in the parcel, was not under such an obligation to make further inquiry as to be guilty of gross negligence if he did not make it. The negligence which will postpone the holder of the legal estate must be so gross as to be tantamount to fraud; *Hewitt v. Loosemore* (a); *Colyer v. Finch* (b); *Evans v. Bicknell* (c); *Barnet v. Weston* (d); *Roberts v. Croft* (e); *Espin v. Pemberton* (f).

Mr. *Follett* and Mr. *Eddis*, for the Appellants.

If this decision can be sustained the state of the law is lamentable. A purchaser who has taken every reasonable precaution is to lose more than the original value of the property, for the benefit of a person who, by his own carelessness, placed his solicitor in a position to commit a fraud on the purchaser. But we contend that it cannot be sustained. The Court will consider a mortgagee guilty of gross negligence equivalent to fraud if he makes no inquiry about the title deeds; *Hewitt v. Loosemore* (a). Here no inquiry was made about the deeds, or about the property, the Plaintiff simply relied on *Hughes*.

His

(a) 9 *Hare*, 449.

(d) 12 *Ves.* 130.

(b) 5 *H. of L. Ca.* 905.

(e) 2 *De G. & J.* 1.

(c) 6 *Ves.* 174.

(f) 3 *De G. & J.* 547.

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His money was advanced to *Hughes* long before the mortgage was executed, he made no inquiry as to what the property was, or who the mortgagor was; he did not know that *Hughes* was the mortgagor, and trusted to *Hughes* to find him a good security. This was gross negligence. It is clear from *Hewitt v. Loosemore*, that a mortgagee must do something. This mortgagee did nothing. An inquiry about the deeds must mean an inquiry from the mortgagor, not an inquiry addressed by the mortgagee to his own solicitor. If the solicitor omits to inquire of the other side, that is gross negligence, of which the client must bear the consequences, the default of his solicitor being, for this purpose, his own default.

The Master of the Rolls considered the label to place matters on the same footing as if an inquiry had been made, and an answer given to the effect of the memorandum on the label. But the memorandum does not contain any representation that *all* the deeds were in the parcel, it rather points the other way. In *Colyer v. Finch* the necessity for inquiry is laid down. In *Roberts v. Croft* both parties were in pari delicto. The second incumbrancer had been quite as negligent as the first, and there was no good reason for depriving the first of the advantage derived from priority of date. In *Hewitt v. Loosemore* an inquiry was made and an answer given, which, though it would not have been enough to satisfy a suspicious man, was held to have been one with which an ordinary person might rest satisfied, without incurring the imputation of gross negligence. In *Espin v. Pemberton* the necessity for inquiry is asserted. In *Plumb v. Fluitt* (a) inquiry was made. In *Worthington v. Morgan* (b) no inquiry was made, and the person having the legal estate was postponed. In all the cases

in

(a) 2 *Austr.* 432.(b) 16 *Simp.* 547.

in which the not having the deeds has been held not to postpone the first mortgagee, there was an inquiry from the mortgagor's solicitor, and the question was, whether the mortgagee was guilty of gross negligence in believing what was told him by a person who had the best means of knowledge. No case goes so far as the Master of the Rolls has gone in the present case, where, if the slightest inquiry had been made, the commission of the fraud would have been rendered impossible. At all events, the order ought not to have directed us to give up the title deeds, and, in that respect, cannot be sustained. It is impossible for the Plaintiff to make out any equitable title to them, and being only a termor he has no legal title to them.

Mr. Swanston in reply.

Judgment reserved.

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The Lord Justice Knight Bruce.

In the early part of the year 1855 a solicitor, employed by his client to lay out money belonging to the client on security at interest, did so, by retaining the money, 1,000*l.*, for the use of the solicitor as borrower, and executing for the amount a mortgage to the client of real and personal property which then belonged to the solicitor. The mortgage deed was executed by him in or before *June*, 1855, and was, in or before *July*, 1855, placed by him in the hands of the client, together with some earlier documents relating to parts of the property, but none relating to a freehold estate in *Essex*, of which the solicitor was seised in fee simple, and which was included in the mortgage. Afterwards, in the Autumn of the

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the year 1855, the solicitor fraudulently sold and conveyed the *Essex* estate as an unincumbered property to a third person, a purchaser for valuable consideration, without actual and, I assume, without constructive notice of the mortgage, and delivered to that person various title deeds, probably all the title deeds, relating to it, except, of course, the mortgage. The Plaintiff in this cause is the mortgagee, the Defendant the subsequent purchaser. The question is one of priority; and the Plaintiff, by his counsel, having agreed that the matter should be treated as if the cause were in hearing, not alone on his bill, a bill of foreclosure, but also on a cross bill by the Defendant to establish the equitable invalidity against him of the Plaintiff's mortgage, the Defendant's counsel on his part has admitted that the Plaintiff, by force of his mortgage, has the immediate legal estate in the disputed property, and is at law entitled to recover it in ejectment against the Defendant and his tenants. In this state of things, the Plaintiff having a title prior in time, and being, to the extent of his mortgage, a purchaser for valuable consideration (and necessarily without notice), I think that, notwithstanding the great hardship of the case on the Defendant, who is altogether blameless, the Plaintiff is entitled against him to an ordinary foreclosure decree. Fraud on the Plaintiff's part there has been none, and if mere negligence could postpone him, there has not been, in my opinion, such negligence on his part as to postpone him. Honestly, though not very prudently, he trusted his solicitor in the transaction to an extent to which perhaps few men would have gone.

The solicitor did not act for any one in the business of the security except himself and the Plaintiff. When the documents delivered to the Plaintiff as already mentioned were so delivered, they composed or were in a parcel or packet which was labelled or bore an inscription thus:

thus:—"Deeds and mortgage by demise of certain premises, being No. 87, *Newman Street, Oxford Street, Middlesex*, for the remainder of a term of ninety-nine years from *Lady Day*, 1761, with covenant for renewal of the term every twenty-one years; and of five mesusages at *Maryland Point, Stratford, Essex*, for ninety years; and assignment of reversionary interest in two sums of stock,—for securing 1,000*l.* and interest at 5*l.* per cent." This label or inscription the Plaintiff was, I think, justified in reading and understanding as a representation that the parcel or packet comprised deeds relating to all the mortgaged property, and if he read it he probably so understood it. We may properly, I think, on the materials before us, believe that neither before the completion of the solicitor's fraud on the Defendant, nor before the solicitor had exposed himself to suspicion, had the Plaintiff examined the contents of the parcel or packet, or ascertained that it did not, besides the mortgage, contain any deed relating to the *Essex* property. In this omission, if omission it ought to be called, the Plaintiff was, I think, for every present purpose justified. What course I should have been disposed to take if the solicitor had had another principal, or there had been another solicitor concerned, it is unnecessary to say; and it is perhaps superfluous to add that I view as immaterial between these parties the circumstance that the Plaintiff, when he accepted the security and received the packet or parcel, was not aware, and possibly until he examined the contents of the packet or parcel continued unaware, of the fact appearing on the face of the mortgage that the solicitor was himself the borrower and mortgagor.

If there had been on the Plaintiff's part any double dealing or any want of good faith, the case would have
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been open to considerations to which, as the facts appear to be, it is in my judgment not open.

Holding, therefore, the Plaintiff to be not under any equitable disability from maintaining ejectment against the Defendant and his tenants, and obtaining possession of the property in controversy as a termor, by force of the mortgage, I must hold him to be entitled to maintain a foreclosure suit and the present decree against the Defendant.

As to the decree, however, I must qualify what I have said by the remark that I think the Plaintiff not entitled, contingently or otherwise, to an order against the Defendant for the delivery of the deeds relating to the estate. This is a point which does not seem at all to have been discussed at the Rolls.

The decree should, as I conceive, be so far only altered; the deposit being returned, and the Plaintiff's costs of the appeal added to his general costs of the suit, so as to be receivable by him in case of redemption.

The LORD JUSTICE TURNER.

This is one of those unfortunate cases in which the question is, by which of two innocent persons a loss resulting from the fraud of a third person ought to be borne, whether it ought to fall upon the Plaintiff the mortgagee or the Defendant the purchaser? Fraud being out of the case on both sides, the question depends entirely upon this, whether there was gross and wilful negligence on the part of the Plaintiff the mortgagee in not having possessed himself of the title deeds, it being now well settled by many authorities that a legal mortgage cannot be postponed by reason of his not having possession

possession of the title deeds, unless there has been fraud or gross and wilful negligence on his part. The case was so recently argued that it is unnecessary to state the facts in detail. It is sufficient to say that *David Hughes*, a solicitor, being seised in fee of the property in question, made a legal mortgage of it to the Plaintiff for a term of years, and delivered to the Plaintiff a bundle of deeds tied up together, with an envelope encircling them, on which there was the following indorsement—[His Lordship read the indorsement]—that this bundle contained the mortgage, but did not contain any of the other deeds relating to the property in question, and that *David Hughes*, having retained the title deeds, afterwards sold and conveyed the property to the Defendant. The Plaintiff, it appears, never examined the bundle of deeds which was delivered to him, but placed it in his iron safe. He had, it seems, been a clerk to a solicitor some twenty years ago, but at the time when this transaction occurred he was and had for many years been carrying on business as a linendraper. He had great confidence in *Hughes*, and placed monies in his hands for investing. The 1,000*l.* advanced on this mortgage was made up of sums received by *Hughes* from him or on his account in *January* and *April*, 1855.

Some reliance was placed in the argument on the part of the Defendant upon the confidence which the Plaintiff reposed in *Hughes*, from which the inference was attempted to be drawn that the Plaintiff looked to *Hughes*, and not to the mortgage, for the repayment of his money; but the very fact of the mortgage having been required proves that the confidence reposed in *Hughes* was not unlimited, and the Plaintiff having required a mortgage must of course be assumed to have intended to have a perfect and sufficient mortgage. The main argument, however, on the part of the

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Defendant

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Defendant was, that there was gross and wilful negligence on the part of the Plaintiff in not having examined the bundle of deeds which was delivered to him, and having trusted to the representation of his solicitor appearing by the indorsement, without further inquiry as to the deeds, circumstances which it was argued amounted to the degree of negligence pointed out in the case of *Hewitt v. Loosemore*; and it was further argued on the part of the Defendant that the indorsement did not purport that the bundle of deeds delivered contained all the deeds relating to the property in question; but there can, I think, be no doubt as to the purport of the indorsement, and that it amounted to a representation that the title deeds of this property were contained in the bundle; and this representation having been made, the Plaintiff cannot, I think, be charged with gross and wilful negligence for not having inquired as to the title deeds (which was the negligence pointed at in *Hewitt v. Loosemore*), unless he is chargeable for having trusted in the representations of his own solicitor. I am of opinion that we should be going far beyond what could be justified, either upon principle or authority, if we were to charge the Plaintiff with gross and wilful negligence upon that ground. Clients in the ordinary course of business trust their solicitors, and negligence cannot be imputed where the ordinary course of business has been observed. If, indeed, we were to charge the Plaintiff on this ground, the effect would be, that in every case where a mortgage was taken by a client from his solicitor, the safety of the client would require that a separate solicitor should be employed on his behalf. It is not necessary, however, to reason upon this point, for it seems to me to be concluded by the authority of *Colyer v. Finch* and *Roberts v. Jones*. It occurred to me in the course of the argument that this case might possibly be distinguished upon this ground, that the Plaintiff, as appears

appears by his affidavit, believed that he was taking the mortgage from some third person, and not from *Hughes*, and might be considered therefore to stand in the same position as if *Hughes* had been his solicitor in the transaction with a third person, and had not inquired, in which case he might perhaps have been chargeable by reason of the neglect of *Hughes*; but on further consideration I am satisfied that this view of the case cannot be supported. To adopt it would be to decide the case, not according to the facts as they actually stand, but as they might have stood if the circumstances had been different, and to do so in ignorance of what the Plaintiff would have done had he known the true state of the case. I agree therefore that in substance this appeal must be dismissed; but there is plainly no case for the delivery of the deeds, and the form therefore must be to vary the decree in that respect. I wish it to be understood that, in disposing of the case, we have proceeded upon the agreement of the parties that it should be treated as if a cross bill had been filed.

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*Dec. 18, 22.*

Before The  
*Lord*  
*Chancellor*  
*LORD*  
*CAMPBELL.*

There may be  
 a special occu-  
 pant of an  
 equitable  
 estate pur  
 autre vie.  
 Leasehold  
 estates pur  
 autre vie were  
 devised in  
 trust for *A.*,  
 his heirs,  
 sequels in right,  
 executors, ad-  
 ministrators  
 and assigns.  
*A.* survived the  
 devisor, and,  
 being illegiti-  
 mate, died  
 without heirs  
 and intestate,  
 living the cest-  
 tuis que vie.  
*Held,* that the  
 devised estates  
 passed under  
 the Wills Act,  
 7 Will. 4 &  
 1 Vict. c. 26,  
 to *A.*'s ad-  
 ministrator (the  
 nominee of the  
 Crown)

THIS was an appeal from the decision of the Master  
 of the Rolls overruling a demurrer to the Plaintiff's bill (*a*).

The material statements of the bill were to the effect  
 following.

Lands at *Hollikersides*, belonging to the see of *Dur-  
 ham*, were in 1832 demised to *Elizabeth Shepherd*, her  
 heirs and assigns, for the lives of three persons and the  
 life of the survivor.

*Elizabeth Shepherd*, by her will dated in *February*,  
 1844, devised and appointed all the real estate, whether  
 freehold, copyhold, leasehold for lives or years, or of  
 whatever tenure the same might be, which she was  
 seised or possessed of or entitled to, unto and to the  
 use of trustees (whom she also appointed her executors),  
 their heirs, sequels in right, executors, administrators and  
 assigns for ever according to the different tenures or  
 natures thereof respectively, in trust for *John Samuel  
 Barron*, his heirs, sequels in right, executors, adminis-  
 trators and assigns for ever.

*John Samuel Barron*, who was illegitimate, survived  
 the testatrix *Elizabeth Shepherd*, and died intestate in  
 1856 without having been married, and leaving the three  
 cestuis que vie named in the lease of the land at *Holli-  
 kersides* him surviving.

After

(*a*) See *Reynolds v. Wright*, 25 Beav. 100.

After the death of *John Samuel Barron*, the Plaintiff, the solicitor for the affairs of her Majesty's treasury, obtained a grant of letters of administration of his estate and effects (as nominee of her Majesty), and placed a tenant at will in possession of the leaseholds at *Hollisterside*.

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Thereupon the trustees and executors of the will of *Elizabeth Shepherd* commenced proceedings in ejectment to recover possession.

The Plaintiff then filed the bill in this suit to restrain the action of ejectment, and to this bill the trustees and executors of *Elizabeth Shepherd* put in the demurrer which had been overruled at the Rolls.

The trustees and executors of the will of *Elizabeth Shepherd* appealed.

Mr. Roundell Palmer, Mr. Anderson and Mr. Haddan, for the Appellants.

It is admitted on both sides that the estate of *John Samuel Barron* in the leaseholds in question was an equitable one; and, also, that had it been possible for him to have left an heir, the heir would have taken as special occupant. Here the legal estate of the premises is in the Appellants; and as there can be no special occupancy of an equitable estate, the Plaintiff has no locus standi in a Court of Equity.

They referred to *Blacks. Com. (a)*; *Vin. Abr. tit. "Occupant;" Bac. Abr. tit. "Estate for Life and Occupancy;" Burgess v. Wheate (b); Low v. Barrow (c); Jones*

(a) Vol. 2, p. 260.
 (b) 1 *Eden*, 177.

(c) 3 *P. Wms.* 262.

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*Jones v. Goodchild* (a); *Zouch v. Forse* (b); *Doe d. Blake v. Luxton* (c); *Atkinson v. Baker* (d); *Bear-park v. Hutchinson* (e); *Wall v. Byrne* (f); *Rawlinson v. Duchess of Montague* (g); *Doe d. Lewis v. Lewis* (h).

Mr. Wickens, for the Plaintiff.

By reason of the illegitimacy of *John Samuel Barron* and his having no child, his administrator, being expressly named in the devise to him, is entitled as special occupant; *Lewis v. Lewis* (h). The Wills Act, 7 Will. 4 & 1 Vict. c. 26, s. 3, treats special occupancy as applying to equitable estates. But if not entitled as special occupant, the Plaintiff is clearly so under the Statute of Wills, 7 Will. 4 & 1 Vict. c. 26, the 6th section of which provides, that in case there shall be no special occupant of any estate pur autre vie, it shall go to the executor or administrator of the party that held the estate thereof by virtue of the grant.

Mr. Palmer, in reply.

The Master of the Rolls' decision turns upon the words of the 6th section of the Wills Act, which have been just cited; but he observed that, if the question had arisen before the passing of that act, it would have been a question whether, under the Statute of Frauds, the Plaintiff could have succeeded. The same words, however, are to be found in both statutes. Here no devise was made by *John Samuel Barron* of the estates pur autre vie, and he left no heir. The Appellants, therefore, as the holders of the legal estate, are entitled to

- (a) 3 P. Wms. 33.
- (b) 7 East, 186, 193.
- (c) 6 Term Rep. 289.
- (d) 4 Term Rep. 229.
- (e) 7 Bing. 179.

- (f) 2 Jo. & Lat. 118.
- (g) 3 P. Wms. 264 (Cox's note).
- (h) 9 Mees. & Wels. 662.

to claim the premises for their own benefit. The words, "in case there be no special occupant," mean in case no special occupant is pointed out in the grant at all, i.e. in case there are no words of limitation in the grant at all.

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Judgment reserved.

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*The LORD CHANCELLOR.*

In the judgment of the Master of the Rolls in this case, as reported, there is a slip in supposing that the legislative enactment relied upon was first introduced by the Wills Act, 7 Will. 4 & 1 Vict. c. 26. A great deal too much was made of this in the argument at the bar on the part of the Appellants ; for the same construction is to be put upon the several sections of this statute respectively, whether they contain new matter or are re-enactments by way of consolidation.

Dec. 22.

The only question distinctly made on behalf of the Appellants is, whether the 6th section of the Wills Act applies to equitable estates in land, and this is answered by the 3rd section of the Wills Act, which expressly says that "it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death." Therefore I cannot doubt that there may be a special occupant of an equitable estate pur autre vie, although the legal estate be in the trustee.

So much being premised, all that is laid down by the Master of the Rolls seems to me inevitably to follow from

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from the only construction that can be put upon the 6th section.

*Elizabeth Shepherd*, leasee of lands to her and her heirs and assigns for three lives and the life of the survivor, devised the property to two trustees in trust for *John Samuel Barron*, his heirs and assigns. *Barron* dies living the cestuis que vie. Now if *Barron* had died intestate, leaving an heir, the heir of *Barron* would have been entitled to enter as special occupant. This, I think, was not denied on the part of the Appellants. *Barron* was illegitimate, and died intestate, without ever having been married, and therefore necessarily without an heir. Does not the 6th section, after providing for the case of special occupancy, go on expressly and clearly to provide for this very case where there can be no special occupancy? "And in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant." Here, upon the death of the grantee of a subsisting estate pur autre vie, there is no special occupant, and there can be no special occupant. What is to become of this estate? We need not speculate whether, irrespective of the statute, it might be seised by any stranger as a general occupant, or what would become of it. The statute says "it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant." Who had this estate by virtue of the grant?—The deceased possessor *Barron*, who had the estate by virtue of the will of *Elizabeth Shepherd*. Who was his personal representative?—*Reynolds* the Plaintiff, to whom administration has been granted. It is quite immaterial in this case that

that administration is granted to *Reynolds* on behalf of the Crown. His rights are the same as if administration had been granted to him as a creditor of the deceased. *Reynolds* being the administrator of *Barron*, and *Barron* being the party that had the estate by virtue of the grant, to whom else can it go? The intention of the legislature clearly was to prevent the scramble that might have occurred from a competition of general occupants, and to secure the property to those who would be entitled to the personal estate of the grantee of the lease pur autre vie.

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The Appellants' counsel, being unable to put any other construction on the clause, were driven to contend that it does not apply to an equitable interest, where there are trustees in whom a legal estate is vested, and who may be supposed to be in the occupation of the land. But this is wholly untenable, and is inconsistent with what I understood to be admitted, that if *Barron* had left an heir, his heir would have been entitled to enter as special occupant.

Having carefully examined all the cases relied upon by the Appellants, I do not think that the decision in any of them touches this case, except the decision in *Doe v. Lewis* (a), and this decision seems to me to be in favor of the Respondent. A lessee of lands demised to him, his heirs and assigns pur autre vie, devised them for the residue of the term to *J. S.* and his assigns. *J. S.* dying intestate, the question was, which was entitled, the heir or the executor of *J. S.*? And the Court of Exchequer unanimously held, that *J. S.* having made no assignment, the case fell within the express words of the 12th section of the Statute of Frauds (from which the 6th section of the

(a) 9 M. & W. 662.

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the late Wills Act is copied), providing that, in case there shall be no special occupant, "it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant."

I am, therefore, clearly of opinion that the decree of the Master of the Rolls was right, and that the appeal must be dismissed with costs.



## HOLROYD v. MARSHALL.

Dec. 8, 10, 22.

Before The  
Lord  
Chancellor  
Lord  
CAMPBELL.

Where equitable assignees of chattels to be subsequently acquired had neglected to perfect their title to the chattels by any act tantamount to taking possession before the chattels were taken under an execution: Held, that the title of the execution creditor was to be preferred.

THIS was an appeal from a decision of Vice-Chancellor *Stuart*, that the Plaintiffs, as equitable assignees by way of mortgage of machinery to be fixed or placed during the continuance of the security upon the mortgaged premises, was entitled to priority over a judgment creditor who had taken possession under an execution.

*James Taylor*, a manufacturer of *Hayes' Mill*, near *Halifax*, had been employed by the Plaintiffs Messrs. *Holroyd*, stuff merchants of *Leeds*, to manufacture for them damask goods previously to his bankruptcy in September, 1858. The machinery of his mill having been put up for sale by his assignees in bankruptcy, was purchased by Messrs. *Holroyd*, who were Plaintiffs. By an indenture dated the 20th September, 1858, made between the Plaintiffs the Messrs. *Holroyd* of the first part, *James Taylor* of the second part, and *Isaac Brunt*, warehouseman of *Leeds*, a trustee, of the third part, after reciting that *James Taylor* was tenant of a mill, buildings and appurtenances, and that the machinery, implements, &c. specified in the schedule thereto were fixed or placed on the

the premises and belonged to the Plaintiffs *Holroyd* absolutely; and that *Taylor* had agreed for the purchase of the said machinery, implements, &c. for 5,000*l.*, but, being unable then to pay the purchase-money, it had been agreed that the same should be secured in manner thereafter expressed: it was witnessed, that the Plaintiffs *Holroyd*, by the direction of *James Taylor*, assigned to *Isaac Brunt* all the machinery, implements, &c. specified in the schedule thereto, upon trust for *James Taylor*, until demand of payment of the 5,000*l.* and interest, and if he should pay to the Plaintiffs *Holroyd* the 5,000*l.* and interest, to *James Taylor* absolutely; but, in case of default in payment, upon trust to sell the said premises and apply the proceeds in satisfaction of the Plaintiffs' claim under their security. The deed contained a proviso that all the machinery, implements, &c. which, during the continuance of the security, should be fixed or placed on the premises in addition to or substitution for the machinery specified in the schedule, should, during the continuance of the security, be subject to the trusts thereby declared concerning the premises: and that *Taylor* would do all acts for assuring such added or substituted machinery accordingly.

This deed was registered as a bill of sale.

The Plaintiffs, the Messrs. *Holroyd*, becoming dissatisfied with *Taylor's* conduct, on the 2nd April, 1859, demanded payment, and on default, took or attempted to take possession of all the machinery, implements, &c. in the mill, and with the consent of *Brunt* advertised them for sale by auction.

It was alleged by *Preller*, the principal Defendant, who was an execution creditor of *Taylor*, that at the time of this attempt the sheriff of *Yorkshire* was already in

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in possession under a *fi. fa.* issued by himself (*Preller*). Messrs. *Holroyd*, however, assumed to act as if they had actually taken possession of the machinery, and proceeded to a sale of the whole of the machinery, implements, &c. on the premises by auction. Their right to the machinery on the premises at the date of the deed was not disputed, but during the sale the sheriff took forcible possession of certain machinery, implements, &c. which had been added to and substituted for machinery specified in the schedule to the indenture by *James Taylor* since the execution of that indenture. The bill was filed by the Messrs. *Holroyd* and *Isaac Brunt* against the sheriff, and execution creditor, and *James Taylor*, to restrain proceedings under the *fi. fa.*, and the question was as to the Plaintiffs' right to this added and substituted machinery.

The evidence as to the question of priority of possession of the machinery, implements, &c. was conflicting. It is detailed in the report of the case below (a), and is summed up in his Lordship's judgment.

Mr. *Mulins* and Mr. *Youl* for the Plaintiffs.

Property not yet acquired, or an interest in property which has not yet come into existence, is in this Court bound by assignment just as much as if it had been in the possession of the assignor at the date of the assignment; *Douglas v. Russell* (b); *Curtis v. Auber* (c); *Lyde v. Mynn* (d); *Hobson v. Trevor* (e); and the interest, when it comes into existence, will at once become subject to the contract; *Metcalfe v. The Archbishop of York* (f); *Newlands v. Paynter* (g); and the same

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| (a) 2 <i>Giff.</i> 285—287. | (e) 2 <i>P. Wms.</i> 191. |
| (b) 4 <i>Sim.</i> 524; 1 <i>M. & K.</i> | (f) 6 <i>Sim.</i> 224; 1 <i>Myl. & Cr.</i> |
| 488. | 547. |
| (c) 1 <i>Jac. & W.</i> 526. | (g) 4 <i>Myl. & C.</i> 408. |
| (d) 1 <i>Myl. & K.</i> 683. | |

same rule prevails at law; *Cheddell v. Galsworthy* (*a*). The evidence shows that *Taylor* was in possession as agent for the Plaintiffs at the time of and prior to the levy by the sheriff. That being so, the Plaintiffs are clearly entitled to the priority claimed by them; *Langton v. Horton* (*b*); *Brace v. The Duchess of Marlborough* (*c*); *Martindale v. Booth* (*d*).

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Mr. *Bacon* and Mr. *Wickens* for the sheriff.

Mr. *Amphlett* and Mr. *Hobhouse* for the Defendant *Preller*.

We do not question the proposition that the equitable charge is sufficient as between the assignor and the assignee to pass chattels afterwards coming into existence; but we maintain that as against the judgment creditor the mortgagees have lost all right to priority by not taking possession before the *jus tertii* was perfected by the levy. That is the rule both in equity and at law; *Congreve v. Evetts* (*e*); *Hope v. Hayley* (*f*); *Mogg v. Baker* (*g*); *Metcalfe v. Archbishop of York* (*h*); *Whitworth v. Gaugain* (*i*); *Newlands v. Paynter* (*k*); *Taylor v. Wheeler* (*l*); *Carr v. Allatt* (*m*); *Lunn v. Thornton* (*n*); *Langton v. Horton* (*b*). Though *Taylor* was in possession at the time of the levy, it was not as agent for the Plaintiffs, but in his own right. He was carrying on the business on the premises not as agent for the Plaintiffs but for himself. When, therefore, the sheriff entered

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|----------------------------------------|---------------------------------------|
| ( <i>a</i> ) 6 C. B. Rep. (N. S.) 471. | ( <i>h</i> ) 6 Sim. 224; 1 Myl. & Cr. |
| ( <i>b</i> ) 1 Hare, 549.              | 547.                                  |
| ( <i>c</i> ) 2 P. Wms. 491.            | ( <i>i</i> ) 1 Ph. 728.               |
| ( <i>d</i> ) 3 B. & Ad. 498.           | ( <i>k</i> ) 4 Myl. & Cr. 408.        |
| ( <i>e</i> ) 10 Exch. 298.             | ( <i>l</i> ) 2 Salk. 449.             |
| ( <i>f</i> ) 5 Ell. & Bl. 830.         | ( <i>m</i> ) 27 L. J., Exch. 385.     |
| ( <i>g</i> ) 3 Mee. & W. 195.          | ( <i>n</i> ) 1 C. B. 379.             |

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and seised the machinery possession had not been taken by the Plaintiffs, and the judgment creditor is clearly entitled to priority. Assuming for the sake of argument that the Plaintiffs are right both upon the law and the facts of the case, their title then would be complete in law, and there was no reason for applying to a Court of Equity. The bill ought, even on that assumption, to have been dismissed.

They cited also *Wilmot v. Pike* (a).

Mr. Youl in reply.

The contention that as against the *jus tertii equity* will not give effect to an equitable title to after-acquired moveable chattels is not borne out by the authorities. *Newlands v. Paynter* (b); *Bennett v. Cooper* (c); *Langton v. Horton* (d), are authorities to the contrary. In the cases cited at law, the deed of assignment contained an express licence to seize, and the possession was referred not to the equitable assignment but to the licence to seize. A licence to seize would have been of no avail in equity. In the present case there is no such licence, and it was necessary therefore to apply to a Court of Equity. In every case where the contract has been between persons claiming by way of equitable lien, and a judgment creditor of the debtor, the decision has been in favor of the former. The judgment creditor can only take that which is the property of his debtor, that is, only the equity of redemption of the prior equitable charge.

Judgment reserved.

*The*

(a) 5 *Hare*, 14.

(c) 9 *Beav.* 252.

(b) 4 *Myl. & Cr.* 408.

(d) 1 *Hare*, 549.

*The Lord Chancellor.*

If (as the Vice-Chancellor assumed) possession had been taken of the machinery in question by an agent of the Plaintiffs before the sheriff's officer entered and seized the property under the fieri facias, I should have had no difficulty in affirming the decree. Although *Taylor* had no interest in this machinery when the bill of sale was executed, yet by virtue of that deed the Plaintiffs acquired a right to have the after-acquired machinery which *Taylor* purchased assigned to them, and if they had taken actual possession of it by their agent, the property would have vested in them; they would have had *jus in re* superinduced upon *jus ad rem*, this being all they before had. Under these circumstances, the subsequent seizure of the sheriff would have been clearly wrongful.

But the possession relied upon by the Vice-Chancellor seems to me to be wholly insufficient, for it was the possession of *Taylor*, the assignor, who cannot be considered the agent of the assignees for this purpose.

An ineffectual attempt is now made to show by the affidavits that *Buckley* and *Sharp*, specially employed by the Plaintiffs, took possession of the machinery before the sheriff's officer. But the possession by *Buckley* and *Sharp* was not earlier than the 30th of April, 1860, and before then, viz., on the 14th of April preceding, the sheriff's officer had entered under the fi. fa. tested the 13th of April, and a man was put in possession of the machinery on behalf of the sheriff. In answer to an allegation in the Defendants' affidavits, that the man continued in possession for the sheriff, it is sworn in an affidavit for the Plaintiffs, that on the 30th of April no

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one was seen to be in possession on *Taylor's* premises under the execution. But although there may not have been such a person in possession when *Buckley* and *Sharp* entered, the right of the judgment creditor would not be defeated by the sheriff's officer after he had once been in possession going for some hours to a neighbouring public-house to refresh or amuse himself.

The result of the evidence therefore I find to be that *Taylor* the assignor remained in possession of the additional machinery from the time when he purchased it till the 14th of *April*, that the sheriff's officer then seized and kept possession of it, and that the Plaintiffs did not try to take possession till after the sheriff's officer was so in possession.

Upon this state of facts the Plaintiffs' counsel have strenuously contended before me that they, under their equitable title, are to be preferred to the judgment creditor. Mr. *Malins* drew a legitimate consequence from this doctrine, that although the sheriff would be excused if, before the claim of the assignees, he had seized and sold the goods, and paid over the proceeds to the judgment creditor, the equitable assignees might still follow the proceeds in the hands of the judgment creditor, and maintain an action against him for money had and received to recover the amount.

But I am of opinion, that notwithstanding the equitable title of the Plaintiffs to this property, as they had not perfected their title to it by any intervening act before possession taken under the execution, the judgment creditor is to be preferred. Till possession taken by the Plaintiffs they had only *jus ad rem*. The property remained in the judgment debtor, and the machinery was part

part of his goods and chattels liable to be taken under the *fi. fa.*

My judgment rests upon Lord *Bacon's* maxim, “*Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio præcedens quæ sortiatur effectum interveniente novo actu.*” Before any subsequent act is done the assignment gives an equitable interest as between assignee and assignor, but a legal interest subsequently *bonâ fide* acquired before possession taken by the equitable assignee shall prevail. I must further observe, that although the term “equitable assignee” is here used, he cannot be considered the assignee in equity of particular specific goods so as to make the assignor the bailee of these goods or holder of them as trustee for the supposed assignee. A bill of sale in this form, as far as non-existing goods are concerned, is only executory, and only gives the supposed assignee an equitable right to have the after-acquired goods assigned to him.

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It is admitted that the supposed equitable assignee who had not taken possession could not prevail against a subsequent *bonâ fide* purchaser of the goods, or of a person who *bonâ fide* advanced money upon an assignment of them as security. But the distinction is taken between such a purchaser or mortgagee and an execution creditor. As the legal title unquestionably remains in the assignor after the supposed equitable assignment, the *onus probandi* lies on the party disputing the right of the execution creditor to be satisfied from the goods and chattels of his debtor. No authority is produced in favor of the preferable claim of the equitable assignee, and the authorities when examined appear to support the claim of the execution creditor. The Defendants cannot cite as conclusive the recent decision of the Court of

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Queen's Bench in *Hope v. Hayley* (*a*), when I had the honor to preside as Chief Justice of that Court, for there only legal rights were to be considered, and consistently with that decision the equitable assignee may succeed against the execution creditor. But in *Mogg v. Baker* (*b*), it seems to be laid down that both in equity and at law till possession is taken by an equitable assignee the legal estate shall be preferred. In *Congreve v. Evetts* (*c*), where the conflicting rights of an equitable assignee and a judgment creditor are considered, Lord *Wensleydale*, then a judge of that Court, intimates, that it was only in respect of the equitable assignee having actually taken possession that his claim could be sustained, and he adds, "If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even an equitable title, to any specific goods; but when executed, not fully and entirely, but only to the extent of taking possession of the growing crops, it is the same, in our judgment, as if the debtor himself had put the Plaintiff in actual possession of these crops." "As to future crops, the bill of sale required an actual seizure and sale to give it operation."

*Langton v. Horton* (*d*) is the decision, upon this subject, of Vice-Chancellor Sir *James Wigram*, a consummate equity Judge, and he prefers the equitable assignee to the judgment creditor, solely on the ground that the equitable assignee had taken possession of the subject matter assigned before the execution. He says, "I have always understood the rule to be, that if the equitable

(*a*) 5 *Ell. & Bl.* 830.

(*b*) 3 *M. & W.* 195.

(*c*) 10 *Erch.* 298, 308, 309.

(*d*) 1 *Hare*, 549, 561.

equitable owner or incumbrancer has done enough to perfect his equitable title he has the better right."

If the rights of the equitable assignee, who has not taken possession, were such as Mr. *Malins* contends for, it does seem strange that till now we have no instance of an equitable assignee filing a bill to restrain the sheriff from selling under a *fi. fa.*, and we have as yet no instance of an equitable assignee bringing an action for money had and received, to recover from the execution creditor the proceeds of the execution, which he has received from the sheriff.

I must, therefore, adjudge that the decree of the Vice-Chancellor be reversed, and that the bill be dismissed with costs.

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*Dec. 20, 21.*

1861.

*Jan. 11.**Before The  
Lord  
Chancellor  
LORD  
CAMPBELL.*

A letter written by a deceased solicitor, proposing to act as the solicitor of a particular individual, held not receivable in evidence, as having been written by the authority of that individual, on proof merely that there was such a solicitor in practice at the time, that the letter was in his handwriting, and that it came from the custody of the person to whom it purported to be addressed;

and held that, in order to render the letter receivable, it must be proved aliunde that the writer had been duly authorized by the individual for whom he professed to act as solicitor.

Where bills of costs of a deceased solicitor to trustees introduced the name of the cestui que trust as having been personally present when the business was transacted, and the bills had been paid by the trustees and allowed in their settlement of accounts with the cestui que trust, held that the bills were admissible in evidence against the cestui que trust in a suit instituted by him upwards of twenty years afterwards against the trustees.

The doctrine that where there is an express trust lapse of time is not material, held not to apply in a case in which there had been gross laches on the part of the cestui que trust.

**BRIGHT v. LEGERTON.**

**T**HIS was an appeal from the decision of the Master of the Rolls dismissing the bill of a cestui que trust under an express trust against the representatives of his deceased trustee after twenty years' delay, on the ground that the delay was not accounted for (*a*).

The suit was instituted to enforce a claim of the Plaintiff *Joseph Bright*, to the produce of certain real estates, and to certain surplus rents under the will of his uncle *William Bright*, who died in 1822, having by his will devised his real estate, consisting of certain parcels of land, houses and cottages, to *Jeremiah Pledger*, *Samuel Legerton* and *Elias Newman*, in trust to apply the rents and profits in payment of an annuity till a child of one of his two brothers should reach the age of twenty-one years, then to be sold and the proceeds invested for payment of the annuity and for the benefit of the children of his two brothers, these children being entitled to the surplus of the rents and profits which should accrue between the death of the testator and the sale.

(*a*) See *Bright v. Legerton* (No. 1), 29 *Beav.* 66.

One

One brother, *Josias*, had no children, the other brother, *John*, had two children, the Plaintiff and a daughter married to a Mr. *Morse*.

The Plaintiff attained the age of twenty-one in *January*, 1839.

*Pledger* had renounced the trust under the will, and one *Larcher* was appointed trustee in his stead. *Newman* died in *November*, 1836. *Samuel Legerton* and *Larcher* managed the estates, applying the rents and profits as far as they would go in payment of the annuity till *July*, 1839, when they sold the estates as directed by the will, and invested the proceeds in the £3 per Cents. *Samuel Legerton* died in 1844, leaving the Defendant *Matilda Legerton* his widow, his executrix. *Newman*, the trustee, having died in 1836, left the Defendants *Augustus* and *Frederick T. Veley* his executors. *Larcher*, the trustee, having died in 1851, left the Defendant *John Jackson Larcher* his executor.

Mr. *Parker*, a solicitor, acted for the trustees from the death of the testator till after the sale of the estates, the investment of the proceeds and the supposed settlement of the accounts between the trustees and the two cestuis que trust. He soon after died.

*Harriet O. Hinson*, the annuitant, died in *October*, 1856.

The bill was filed in *August*, 1859. It sought an account of the rents and profits of the estates from the death of the testator in *December*, 1822, till the estates were sold in *July*, 1839, but did not allege that the trustees had received anything which they had not debited themselves with and satisfactorily accounted for to the cestuis que trust. The grievance of which it complained

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complained was, that they did not properly manage the estates and collect the rents. It contained no charge of fraud against them, nor any allegation that any of them derived any personal advantage from the supposed mismanagement. The bill alleged that from the time of the death of the testator down to *Michaelmas*, 1839, the time fixed for the completion of the sale, the trustees neglected and omitted to raise, as they might and ought to have done, sums (which it specified) over and above the monies accounted for in respect of the rents and profits which, from the wilful neglect and default of the trustees, had been lost to the estate of the testator, and it prayed that an account might be taken of the rents and profits of the real estate of the testator, neglected and omitted to be received by *Samuel Legerton, Newmann and Larcher*, or any or either of them, and which, but for the wilful neglect or default of them, or any or either of them, might have been received, and of the interest which has accrued due in respect of such rents and profits.

In explanation of his delay in instituting the suit, the Plaintiff alleged that, in *October*, 1858, he had for the first time discovered the default of the trustees, in the course of proceedings in another suit of *Bright v. Larcher* (a), in which all the circumstances were disclosed.

The Defendants insisted that the Plaintiff's claim was barred by lapse of time, and by his laches and acquiescence, and to prove his knowledge they produced a letter, purporting to be written in *July*, 1842, by a Mr. *Meggy*, a solicitor, and entitled "Re *William Bright's* executorship." The writer professed to be acting on behalf of the Plaintiff, and stated that, on payment of £50*l.*,

(a) See *Bright v. Larcher*, 27 4 De G. & J. 608.
Beav. 130; 3 De G. & J. 148;

£50*l.*, the Plaintiff and his sister would receive it in liquidation of what might be due, "otherwise they will be compelled to claim all that may appear to be due on taking the accounts, as may be directed by the Court of Chancery." That letter was addressed to Mr. *Veley*, and was dated 38, *Great Tower Street*, 1st *July*, 1842.

The Defendants also produced several bills of costs of Mr. *Parker*, their solicitor, relating to the affairs of the trust; and also cash accounts, sent by Mr. *Parker* to the executors, and signed by them. One of these bills of costs contained (among others) the following items:—

- " 1837. *Sept. 26.* Attending Miss *Hinson*, and conferring a considerable time relative to the arrear of cottage rents, and conferring thereon.
- " Writing six letters requiring payment of arrears of rents due from the cottage tenants.
- " 1839. *April 31.* Attending Mr. *Joseph Bright*, conferring and advising on the business of the estate, and receiving directions to procure a final settlement of the trust business.
- " *May 6.* Attending Mr. *T. Veley*, when he brought copies of Mr. *Newman's* accounts in the executorship and trusteeship, and conferring thereon.
- " *May 7.* Attending Mr. *Joseph Bright*, producing to him the accounts received from Mr. *Newman's* executors, which he requested me to inspect; and conferring and advising fully thereon, and on the business of the trust.
- " *May 9.* Perusing and considering Mr. *E. Newman's* accounts, and drawing out a statement of the rent account of each tenant, in order to ascertain if all the rents were duly accounted for, which was very far from being the case.

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- “ 1839. *July 19.* Attending Mr. *Joseph Bright* and Mr. *Unwin*, his sister’s solicitor, conferring and advising on the subject of the sale, which it was determined should be without reserve; preparing memorandum to that effect, and getting same signed.
- “ 1840. *July.* Writing letter to Messrs. *Sims & Unwin* in answer to one from them on the business of the trust, and appointing 6th *August* for going through the accounts.
- “ Writing letter to Mr. *Legerton* with information of the appointment, and requesting his attendance.
- “ The like letter to Mr. *Larcher*.
- “ The like letter to Miss *Hinson*.
- “ The like letter to Mr. *Joseph Bright*.
- “ For several attendances on Mr. *Veley* relative to Mr. *Newman’s* accounts and as to subsequent rents received by him, and getting same inserted in the account.
- “ Drawing out statement of the trust accounts.
- “ Making fair copy thereof.
- “ Aug. 4. Writing letter to Messrs. *Sims*, and sending copies of account.
- “ Attending parties to-day by appointment, going through the accounts.
- “ 1842. *April 8.* Writing letter to Mr. *Meggy* in answer to one from him requiring information relative to the accounts as to non-receipt of rents and balances in trustees’ hands, and referring him to the executors of Mr. *Newman*.
- “ *April 12.* Attending Mr. *Meggy* in *Great Tower Street*, in consequence of another letter from him, and conferring relative to the accounts.”

The Plaintiff, on the other hand, by his affidavit swore positively

positively that he never saw Mr. *Meggy* in his life, and that he never employed Mr. *Parker* as his solicitor.

At the hearing of the cause, the Master of the Rolls held, that the letter alleged to have been written by *Meggy* as well as the bills of costs and cash accounts of Mr. *Parker* were admissible in evidence; and, on the ground of lapse of time, dismissed the Plaintiff's bill (*a*).

The *Attorney-General* (Sir *Richard Bethell*) and Mr. *Nalder*, for the Plaintiff, in support of the appeal.

The Plaintiff's beneficial interest under the will of the testator did not accrue till the real estate became saleable in 1839. Until that time he was under no obligation to call for an account in respect of his present demand. But it was not till 1858 that he acquired a full knowledge of his rights, and in *August*, 1859, the present bill was filed. Mr. *Meggy's* letter is not admissible in evidence against the Plaintiff, there being no proof aliunde that it was written by a person acting as his solicitor. The Master of the Rolls erred in admitting the letter as *prima facie* evidence of the relation of solicitor and client existing between the writer and the Plaintiff, and then admitting it as evidence of a declaration made by the writer in the course of professional business; *Taylor on Evidence* (*b*). So, in admitting *Parker's* bills of costs as evidence against the Plaintiff, it being nowhere proved that *Parker* acted as the Plaintiff's solicitor; *Short v. Lee* (*c*); *Baron de Ruzen v. Farr* (*d*). But this evidence is immaterial to the issue. It was admitted by the Master of the Rolls as showing that the Plaintiff knew of the non-receipt of the surplus rents by the trustees, and of his being, therefore, barred by acquiescence. But no such case as acquiescence can be maintained

(*a*) *Bright v. Legerton* (No. 1), (*c*) 2 *J. & W.* 464.

29 *Beav.* 60—69.

(*d*) 4 *Ad. & E.* 53.

(*b*) *Vol.* 1, *p.* 549.

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maintained as a bar to the claim of a cestui que trust, in respect of his beneficial interest as against his trustee. No such case can prevail while the relation of trustee and cestui que trust continues to exist. No case of acquiescence can arise from the mere non-assertion by the beneficiary of his claim. The case of a trust is expressly saved by the statute 3 & 4 Will. 4, c. 27, s. 25. The doctrine that the Court will not interfere in aid of stale demands, or in cases of gross laches, does not apply as between the trustee and beneficiary of an express trust, because the trustee and his cestui que trust being considered as one in point of interest, they cannot be set in opposition to each other, though when there has been a settlement of accounts between the parties that raises a distinction; *The Duke of Lerd v. The Earl of Amherst* (a); *Knight v. Bowyer* (b); *Wedderburn v. Wedderburn* (c); *The President and Scholars of St. Mary Magdalen College, Oxford v. The Attorney-General* (d). It is not even attempted to be proved that the transaction was closed or the accounts rendered, but it is merely alleged that the Plaintiff had in 1839 a knowledge of his title as cestui que trust, by acting upon which before he might have recovered his demand at an earlier period. There is no evidence here establishing such knowledge on the part of the Plaintiff. One erroneous item in a trust account has been held sufficient as a ground to open the account after a lapse even of forty years; *Allfrey v. Allfrey* (e).

Mr. Follett, Mr. Grenside and Mr. J. T. Humphry, for the executors of Larcher.

Mr. Meggy's letter is *prima facie* evidence that he acted as the Plaintiff's solicitor in the matter to which it refers,

(a) 2 Ph. 117.

(d) 6 H. L. Cas. 189.

(b) 2 De G. & J. 421.

(e) 1 Mac. & G. 87.

(c) 2 Kee. 722; 4 Myl. & Cr. 41.

refers, and being written in the regular course of business by the writer, is receivable in evidence; *Sussex Peerage Case (a)*; *Doe d. Patteshall v. Turford (b)*.

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It has been decided that a cestui que trust cannot sustain a suit twenty years after he has had notice of the non-receipt of money by his trustee; *Browne v. Cross (c)*, and that lapse of time is as much a bar as between cestui que trust and trustee, as in other cases as to laches; *Portlock v. Gardner (d)*; *Phillipo v. Munnings (e)*. There is in this case no evidence of wilful default on the part of the trustees, and there has been gross negligence on the part of the Plaintiff, and under such circumstances the Court will not interfere; *Coope v. Carter (f)*; *Walker v. Symonds (g)*; *Pickering v. Lord Stamford (h)*; *Sleight v. Lawson (i)*. The Plaintiff was party to the suit of *Bright v. Larcher (k)*, in which he might have had the testator's estate completely administered. He should, therefore, have sought the relief by applying for leave to file a supplemental bill, in the nature of a bill of review, in that suit, and not by the institution of another suit; *Hodson v. Ball (l)*; *Partington v. Reynolds (m)*.

Mr. Selwyn, Mr. G. L. Russell and Mr. W. H. G. Bagshawe appeared for other Defendants.

The Attorney-General replied.

Judgment reserved.

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| (a) 11 <i>Cl. &amp; Fin.</i> 113.    | (h) 2 <i>Ves. jun.</i> 272.                                                        |
| (b) 3 <i>Barn. &amp; Ad.</i> 890.    | (i) 3 <i>Kay &amp; J.</i> 292.                                                     |
| (c) 14 <i>Beav.</i> 105.             | (k) 27 <i>Beav.</i> 130; 3 <i>De G. &amp; J.</i> 148; 4 <i>De G. &amp; J.</i> 608. |
| (d) 1 <i>Hare,</i> 594.              | (l) 1 <i>Ph.</i> 177.                                                              |
| (e) 2 <i>Myt. &amp; Cr.</i> 309.     | (m) 4 <i>Drew.</i> 261.                                                            |
| (f) 2 <i>De G., M. &amp; G.</i> 292. |                                                                                    |
| (g) 3 <i>Swanst.</i> 1.              |                                                                                    |

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*The LORD CHANCELLOR.*

The first question discussed at the hearing of this appeal was whether a letter, written by a deceased solicitor purporting to act as the solicitor of a particular individual, is receivable in evidence as having been written by the authority of that individual, on proof that there was such a solicitor in practice, that the letter is in his handwriting, and that it comes from the custody of the person to whom it purports to be addressed. I am bound to say that on this question I cannot agree with the Master of the Rolls. Proof being given that a solicitor had a lawful and valid mandate, any written entry or verbal declaration by him, in the performance of the duty thus intrusted to him, will be admissible in evidence after his death. On this principle rests the class of cases of which *Doe d. Patteshall v. Turfard* (*a*) is most frequently cited. But in all these cases the character of the deceased mandatory must be proved aliunde before his entry or declaration is received. With regard to public officers a different rule is followed, and upon the simple evidence of their acting their authority so to act is presumed, as in the instance, which used frequently to occur, on trials for perjury in an answer sworn before a Master in Chancery. No evidence was required of the authority of the Master in Chancery to administer the oath, beyond his acting in this capacity when the oath was administered. But a solicitor cannot be considered a public officer for this purpose, and his simple assertion that he was acting under a particular retainer cannot raise a presumption that it was his duty to make an entry or declaration so as to render that entry or declaration admissible evidence for or against his supposed employer. Therefore

(*a*) 3 Barn. & Ad. 890.

fore I think that the letter (to which so much importance is attached) of the deceased solicitor, Mr. *Meggy*, purporting to have been written by him in *July*, 1842, under the authority of the Plaintiff, was not shown to be properly admissible in evidence against the Plaintiff.

In minutely examining the voluminous accounts left with me, I find items which, perhaps, might have shown that Mr. *Meggy's* letter was acted upon with the knowledge of the Plaintiff, so as to have made it admissible; but these items were not relied upon either by the Judge or by the counsel, and therefore I cannot venture to give any weight to Mr. *Meggy's* letter in disposing of this appeal.

Wholly irrespectively of that letter, however, I have come to the conclusion that the Master of the Rolls was fully justified in dismissing the bill.

While considering this, it is most material to attend to the leading facts of the case, the important dates, the complaint made by the bill, and the prayer of the bill. [His Lordship then stated the facts of the case as set forth above.]

I am of opinion, with the Master of the Rolls, that the Plaintiff's claim, when he filed his bill, was barred by laches and acquiescence.

The Plaintiff's counsel argue, that this is an express trust, and that wherever there is an express trust no lapse of time can be a bar.

This was an express trust in its creation, but there is no continuing trust as in *Wedderburn v. Wedderburn* (a), and

(a) 2 *Kee.* 722; 4 *Myl. & Cr.* 41.

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and other cases of that class relied upon. The trustees are charged with no act in breach of any duty nor with the omission of any duty which they ought to have performed within twenty years before the filing of the bill. But the trustees being all in their graves, their representatives are called upon to show that the trustees made the most of the estates from the year 1822 to the year 1839 inclusive, and to prove that cottage rents were not collected forty years ago, because the cottages had tumbled down, that some cottagers were not distrained upon because the cottagers were too poor to pay, and that when others were distrained upon their effects did not sell for more than the costs of the distress.

Now this seems to me to be a case of gross laches, to which the doctrine does not apply that where there is an express trust lapse of time is to be entirely disregarded. Between 1822 and 1839 the Plaintiff had such an interest in the surplus rents and profits of the estates as would have entitled him while a minor, by his next friend, to have filed a bill against the trustees for any mismanagement with which they were chargeable. In the beginning of 1839 he came of age; it appears that he had been living on the estates while a minor, and that he has continued to live in the neighbourhood ever since. Irrespective of any evidence of accounts being rendered to which he assented, has he a right to rely on the maxim that where there is an express trust time never runs to the cestui que trust, as it was used to be said, "nullum tempus occurrit regi," or "nullum tempus occurrit ecclesiæ." Might such a bill as this be filed at the end of a century by the Plaintiff's personal representative against the personal representatives of the three trustees if they could be found out? I apprehend that in such a case it is unnecessary to presume the execution of a release or to resort to any statute of limitations. A Court
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of Equity will not allow a dormant claim to be set up when the means of resisting it, if unfounded, have perished, much less cast a burden of proving such an affirmative as, that forty years ago cottage rents were properly collected when the witnesses who might have proved the fact have long ago been called into another state of existence. It has been beautifully remarked with respect to the emblem of Time, who is depicted as carrying a scythe and an hour-glass, that while with the one he cuts down the evidence which might protect innocence, with the other he metes out the period when innocence can no longer be assailed.

But in the present case I think there is strong proof of acquiescence, with knowledge of the material facts which the Plaintiff relies upon.

Although the mere entries in a solicitor's books of business alleged to have been done by him, or in a bill of costs and disbursements made out by him in the regular course of business, would not be evidence against third persons, I agree with the Master of the Rolls in thinking that *Parker's* bill of costs made out to the trustees, introducing the name of the Plaintiff as being personally present when the business was transacted, paid by the trustees and allowed in the settlement of the accounts with the cestuis que trust, are admissible evidence against the Plaintiff, who is a cestui que trust.

Now giving faith to the items stated in *Parker's* bill of costs, they prove by demonstration that in the summer of 1839, after the Plaintiff came of age, the accounts of the testator's estate were submitted to the Plaintiff, that he knew full well that *Parker* was employed to conduct the business and to arrange the settlement of the accounts

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between the Plaintiff, his sister and the trustees, that the Plaintiff then had an abundant opportunity of inquiring into the rents and profits of the estates between the death of the testator and the sale, and with such knowledge and means of knowledge that he came to the settlement which, after twenty years, he now seeks to disturb. I need not copy the items which the Master of the Rolls has selected and enumerated, to which several others equally strong might be added.

The Plaintiff strictly denies having seen the accounts, or having employed *Meggy* or *Parker*, or having had any interviews with them on the subject. But like the Master of the Rolls, I give credit to the written document rather than to the frail memory of the Plaintiff or the representations of the Defendant *Steele*, his solicitor, who though joined as a Defendant I suspect to be the real Plaintiff in this suit, he having purchased speculatively the principal part of the Plaintiff's interest in the supposed deficiency of the rents and profits of the estates before they were sold in 1839.

Exhibit K, the *res noviter ad notitiam veniens*, is the only plausible foundation for the suit. This was a case laid before counsel on behalf of some of the trustees in the year 1840 and coming to the knowledge of the Plaintiff and Mr. *Steele* in the year 1859. It contains the following passage: "after the removal of Mr. *Legerton*, and before the death of Mr. *Newman*, he (*Newman*) had suffered several of the cottagers to run in arrear with their rents, in some instances as many as seven or eight years, whereby the estates sustained considerable loss, the tenants having in some instances died or removed, and all of them being laborers; and consequently if they were allowed to get into arrear they could not pay, nor would their goods if distrained be sufficient to answer the

the amount due." But I do not see how this alleged admission is evidence against the representative of *Newman*, or any sufficient ground for now instituting the inquiry about the lost rents. Several distress warrants against cottagers are likewise put in evidence, but while they show that the trustees did not shrink from resorting to severe measures against defaulting cottagers, I do not think that from the existence of the distress warrants an inference can be legitimately drawn that the distress warrants produced the rent distrained for. Indeed, this is not charged nor insinuated, for all that the trustees have to answer is the charge of neglecting to receive the rents.

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It is not pretended that the representatives of the three trustees, one of whom was not appointed till some progress had been made in the execution of the trust, another of whom died long before the sale of the estates, and the third of whom had ceased to take an active part in executing the trust, are all jointly liable for the whole of the deficiency now claimed in respect of the rents not being properly collected between the death of the testator and the sale of the estates in *July*, 1839. No hope is held out of any equitable apportionment of the liability, although if there had been any ground for the complaint this might easily have been accomplished twenty or thirty years ago.

I have carefully examined the cases relied upon on behalf of the Appellant, but I do not think it necessary to prolong this judgment by commenting upon them *seriatim*, for beginning with the *Duke of Leeds v. Lord Amherst* (a), they are all palpably distinguishable from the present, and I am fully convinced that by dismissing

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(a) 2 Ph. 117.

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the bill there is no rule of this Court violated or impaired. I would even venture to add in the words of a great judge, "But assuming that, according to the ordinary practice of the Court, there is nothing to prevent an inquiry being directed, it still remains to consider whether there was matter enough on the facts and documents stated on the report to render this inquiry before the Master probably useful. I am of opinion that at the utmost they raise a doubt as to an obscure matter, upon which all the persons who could have given important information have passed to their graves leaving us only the means of conjecture. There would be great hazard of a miscarriage of justice if this matter should be gone into;" *Coope v. Carter* (a).

However, as I think it was material that the law laid down in the Court below relating to the admissibility of letters should be reviewed, I direct that the appeal be dismissed without costs, and that the deposit be returned to the Appellant.

(a) 2 *De G., M. & G.* 292, 299.

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Ex parte ALONZO AUGUSTUS WILDBORE.**In the Matter of ALONZO AUGUSTUS WILDBORE, a Bankrupt.**

THIS was an appeal by the Bankrupt from an order of Mr. Commissioner *Evans*, refusing a certificate on the ground of fraud.

The alleged fraud was as follows:—A man named *Summers*, who had married a sister of Mr. *Wildbore's* wife, had carried on business as a jeweller in *Hatton Garden*, had twice been bankrupt, and was uncertificated. Mr. *Wildbore*, who was a chemist, allowed him to resume the business of a jeweller in Mr. *Wildbore's* name, “*Wildbore, late Summers*” being printed over the shop, but the business being carried on by *Summers* for his own benefit. Several persons to whom *Summers* applied for goods, not choosing to trust him, referred to *Wildbore* to know whether *Summers* had authority from him to order them, and were informed that they might safely supply him. A Mr. *Manger*, who had supplied goods to *Summers*, and to whom *Summers* tendered a bill accepted in Mr. *Wilbore's* name, per proc. *James Summers*, declined to receive it without a letter from Mr. *Wildbore* stating that *Summers* had authority to accept bills for him. *Summers* produced such a letter, which Mr. *Manger* took to Mr. *Wildbore*, and asked him whether it was signed by him. Mr. *Wildbore* replied that it was. Mr. *Manger* then asked him whether the business at *Hatton Garden* was his. He replied that it was, and

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TICES.*

W., a chemist, allowed *S.*, who was an uncertificated bankrupt, to carry on business as a jeweller in the name of *W.*, but for his own benefit, *W.* making himself liable for the debts. Some persons to whom *S.* applied for goods asked *W.* whose the business was, to which he replied that it was his, and that *S.* was carrying it on for him. *S.* absconded, carrying away all the goods belonging to that business, and *W.* shortly afterwards became bankrupt, almost all his debts being debts contracted by *S.* in the jewellery busi-

ness:—*Held*, reversing the decision of the Commissioner, that the representation by *W.* that the business was his, was not a fraud disentitling him to a certificate.

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that *Summers* carried it on for him. This occurred in *May*, 1859. In *September* following *Summers* absconded, and no jewellery could be found on the premises. On the 28th of *September* Mr. *Wildbore* became bankrupt, having hardly any assets, and owing hardly any debts except those connected with *Summers's* business, which were heavy. The creditors suspected that the Bankrupt was in communication with *Summers*, but failed in establishing it. The Commissioner, however, considered that the above proceedings of Mr. *Wildbore* were fraudulent, and he refused a certificate without granting protection.

Mr. *Bacon* and Mr. *Clement Swanston* for the Appellant.

The conduct of the Bankrupt in thus lending the use of his name to *Summers* was imprudent, but not fraudulent. The representations which he made were substantially true. What Mr. *Manger* wanted to know was, whether the Bankrupt was responsible for the debts of the business carried on by *Summers*; it mattered but little to him whether *Wildbore* or *Summers* received the profits. We submit, moreover, that the Bankrupt's conduct in this respect, whatever view be taken of its moral character, was not "conduct as a trader;" *Ex parte Spicer, In re Mathias* (a); *Ex parte Wakefield, Re Wakefield* (b).

Mr. *Roxburgh* for the Assignees.

The creditor asked whose the business was, and the Bankrupt answered that it was his own, which statement he now admits to have been false. [The LORD JUSTICE KNIGHT BRUCE: Has he ever attempted to avoid liability for the debts of the business?] No; he could

(a) 2 *De G. & Sm.* 601. (b) 4 *De G. & Sm.* 18.

could not have avoided it; but if the creditor had been told that the business belonged to *Summers*, he would probably have declined to trust either the Bankrupt or *Summers*. At all events he had a right to have the facts truly stated to him. [*The LORD JUSTICE KNIGHT BRUCE*: Did the creditor, when he asked his question, wish to learn anything more than whether he should have the Bankrupt's personal security?] That, no doubt, was the principal thing he wished to know; but it cannot be said that the circumstance of a man's lending his name to an uncertificated Bankrupt is immaterial in determining whether and to what extent he may be trusted. [*The LORD JUSTICE TURNER*: The business was the Bankrupt's as regarded liability, and the creditor knew that *Summers* managed it. It does not appear that Mr. *Manger* was substantially deceived.]

Mr. *Bacon* in reply.

The LORD JUSTICE KNIGHT BRUCE.

The Bankrupt, as his counsel have admitted, acted with great imprudence. He has never attempted to deny his liability for the debts of the business carried on by *Summers*. As far as regarded liability, it was the Bankrupt's business. Had he been asked, "Do you allow *Summers* to deal with the business as he likes, and to receive the profits for his own use," and given an incorrect answer, he might have found himself in a very different position from that in which he now stands. But what he said was in a sense true, nor had he, as I conceive, an intention to have his words understood in a sense different from the reality. The Bankrupt's conduct was certainly blameable, but it seems to me to have been not otherwise than venially blameable. In my judgment, therefore, it will be sufficient for the purposes of justice to

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to withhold the certificate for twelve months from this day, granting protection in the mean time; the certificate to be of the second class.

The LORD JUSTICE TURNER.

If I had been satisfied that the Bankrupt had made any fraudulent or false representations in the sense in which I understand those words, I should have taken the same view of this case as the learned Commissioner has done. The only case however made against the Bankrupt is, that when he was asked whether the business was his, he said it was, whereas, as regarded profit, it was the business of *Summers*. Now in one sense it was the Bankrupt's business, for he was subject to its liabilities: in another sense it was not his, for he was not entitled to the profits. The representation made by the Bankrupt was therefore to this extent incorrect, but it cannot, I think, be said to have been fraudulent, unless the bankrupt intended by it to deceive the person to whom it was made, and I think we should not be justified in supposing that he did. What is to be considered to have been the object of the creditor's inquiry? Not, I think, to find out who was entitled to the profits, but who was liable to the debts, it being of little comparative importance to the creditor to know who received the profits. Looking at the question in this point of view, the answer was substantially correct. I think, therefore, that the Bankrupt cannot be considered to have made a fraudulent misrepresentation, though he has been guilty of a blameable degree of imprudence, and I concur in the judgment which my learned Brother has pronounced.



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**Ex parte ALEXANDER BODDAM, Tudor Castle
and Boddam Castle.**

**In the Matter of JAMES WILLIAM TAYLOR,
a Bankrupt.**

THIS was an appeal from a decision of Mr. Commissioner *Goulburn* refusing to admit a proof by the trustees of the bankrupt's marriage settlement.

The bankrupt, in contemplation of his marriage gave to trustees a bond for 10,000*l.* dated the 28th of *February*, 1817, payable in six months, the trusts of which were declared by a settlement of even date. It was declared by the settlement that the trustees "shall from time to time during the natural life of the said *J. W. Taylor*, or until he shall become bankrupt or insolvent, permit and suffer him to retain in his hands the said sum of 10,000*l.* hereinbefore mentioned to be secured by his said bond or obligation, or such part or parts thereof as he shall think fit." The money when paid was to be held in trust for the bankrupt for life, and after his death upon certain trusts for his wife and children.

*May 4.
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tices.*

A man on his marriage gave to trustees a bond conditioned for payment of 1,000*l.* with interest. By a settlement of even date it was declared that the trustees should, during his life or until he should become bankrupt or insolvent, allow him to retain in his hands the 1,000*l.* or such parts of it as he should think fit. In

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rupt. The

trustees in 1827 proved for the whole 1,000*l.* but the commissioners expunged the proof, and the trustees did not take any steps to have a value set upon the bond as for a sum payable on the bankrupt's death, and to be allowed to prove for the amount of the valuation. In 1860, the bankrupt being dead, and fresh assets having come in, the trustees applied again to prove for the whole amount.

Held, that although the provision for calling in the money on bankruptcy was void, the debt was valid as a debt payable upon the death of the bankrupt, and that proof of it ought now to be allowed, not disturbing former dividends.

Held, that the decision in 1827 was not a judgment against the present claim, the debt not being then payable, and no attempt having been made to prove for it on the footing of its being payable in futuro.

1860.

Ex parte
BODDAM.

Re
TAYLOR.

The marriage was solemnized, and children were born who lived to acquire a vested interest under the trusts of the settlement.

Mr. *Taylor* was not in trade at the time of his marriage, but he subsequently entered into business, and in 1826 he became bankrupt. On the 15th of *December*, 1826, the trustees tendered a proof for the 10,000*l.* which was admitted; but the assignees subsequently moved to have it expunged, and on the 26th of *April*, 1827, it was expunged by the commissioners after argument, and a memorandum was made on the proceedings that in their opinion the 10,000*l.* was not due, either wholly or in part.

The bankrupt obtained his certificate and went to the East. He had not been heard of since 1830, and it was believed that he died in that year.

A large sum of money having unexpectedly come in to the estate the trustees of the settlement in 1860 applied for leave to prove, not disturbing former dividends. The commissioner rejected the proof, mainly grounding his decision, as it was stated, upon the fact that an adjudication upon the case had been made by the commissioners in 1827. He however directed the official assignee to retain the funds for a reasonable time in order to give the applicants an opportunity of appealing if they should be so advised.

Mr. *Selwyn* and Mr. *Bagley* for the Appellants.

The first objection made to our claim was that the commissioner had no jurisdiction to entertain the application. This we submit is groundless. A new fund has come in and must be duly administered according to the rights of the creditors, so that delay is no objection. The act

act 6 Geo. 4, c. 16, under which this bankruptcy took place, does not limit the time of appeal. But we need not resort to that argument, we are not appealing from the decision of 1827. The proof then tendered was for the whole 10,000*l.* as immediately payable, treating the provision that the debt should become immediately payable on bankruptcy as good. No attempt was made to prove as for 10,000*l.* to become payable on the bankrupt's death.

As regards the event on which the money was to become payable, so much as relates to bankruptcy must be cut out. [The LORD JUSTICE TURNER referred to *Higinbotham v. Holme* (a).] We do not at all dispute that case, which doubtless lays down perfectly good law, the only result of its application to the present case is that when bankruptcy happened the 10,000*l.* must be treated as a sum of which, according to the terms of the settlement, payment could not be called for until the death of the bankrupt.

Mr. Bacon and Mr. Howard for the assignees.

This was not a contingent debt, nor a debt payable in futuro, and it was not within the section as to contingent debts. There was a legal bond debt payable at once, subject to a trust that it should not be called in till bankruptcy or death. Bankruptcy having happened the restraint was gone, and the debt according to the terms of the deed was payable at once. If proveable at all it was proveable in 1826, and this is an attempt to review the decision of the commissioners in 1827. The debt never was proveable in any shape, a man cannot legally covenant that in the event of his bankruptcy a sum, which in other events he is not liable to pay, shall be payable out
of

(a) 19 Ves. 88.

1860.
Ex parte
BODDAM.
Re
TAYLOR.

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BODDAM.

Re
TAYLOR.

of his assets; *Higinbotham v. Holme* (a); *Ex parte Hodgson* (b); *Ex parte Hill* (c). If Mr. Taylor had died without having become bankrupt the demand against his estate would have been good, but an event having happened on which, according to the terms of the settlement, payment became enforceable, the Court cannot pass over that event and go to another subsequent contingency, also provided for by the settlement. *Re Murphy* (d), is very like the present case. [The LORD JUSTICE TURNER. At that time there was no power to prove for contingent debts, may not that make a difference?] It would be most mischievous to allow a demand of this nature to be proved as a contingent debt, a trader would then have nothing to do but to covenant by his marriage settlement for payment of an enormous sum on his death, and a value being set upon it a large sum would be taken out of the assets to the prejudice of creditors.

A reply was not called for.

The LORD JUSTICE KNIGHT BRUCE.

In the particular circumstances the learned Commissioner in my judgment took a correct course in remitting the case for the consideration of this Court. As to the decision by the three Commissioners in the year 1827, that seems to me to make no difference in the present instance, for, though in form and expression they decided that no part of the debt sought to be proved was proveable, the point whether the debt ought not to be valued as a debt payable in futuro, and a proof admitted on such a valuation, was not in fact before them;—the only question then raised having been as to the right to prove

- (a) 19 Ves. 88.
(b) Ib. 206.

- (c) Cooke, *Bank. Law*, p. 251.
(d) 1 Sch. & Lef. 44.

prove immediately for the whole sum without any valuation; and upon this point their decision was right. Had they been asked to admit a proof for any part of the sum without valuation, they would probably have been right in refusing the application, but had they been asked to allow the debt to be valued as a debt payable on the death of the bankrupt, and to admit a proof for the amount of the valuation, they probably would have admitted the claim. Many years have since elapsed, and it is extraordinary that the case should have been allowed to sleep so long after the death of the bankrupt; but I do not see in that any ground for suspicion. It is said, on the part of the Petitioners, that until lately there was no estate to make it worth while for them to bring forward their claim. It is answered that in 1849 a dividend was declared in which the Petitioners did not seek to participate. It is needless however to speculate as to the reasons for so long a delay. We must consider then what was the nature of the contract, out of which the demand arises. Script of verbiage the contract was this, a covenant or bond entered into by Mr. *Taylor* for valuable consideration, long before his bankruptcy, to pay to the trustees within six months the sum of 10,000*l.* with interest, but by a contemporaneous deed, which may be considered as incorporated in the covenant or condition of the bond, he was to have the whole of his life to pay it in, unless he should choose to pay it sooner; subject to this exception, that if he should become bankrupt or insolvent, the principal was to be immediately recoverable; and under the trusts he was beneficially tenant for life of the money; considering therefore the policy of the bankrupt laws, and the general law of the country bearing on the subject, this was in effect a covenant or bond, conditioned for payment of 10,000*l.* on the death of the obligor and not sooner, unless he should think fit. It was an obligation for payment of the sum

at

1860.

Ex parte
BODDAM.

Re
TAYLOR.

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BODDAM.

Re
TAYLOR.

at the death of the obligor at latest, though he might pay it sooner, and there was an invalid clause purporting to enable the trustees in certain events to enforce payment sooner. That clause does not in my judgment prevent the bond or covenant from being good for payment at the death of the obligor. If the bankrupt were now alive it would, I apprehend, be right to order a valuation of his life interest, and to admit a proof for the residue of the sum, after deducting the amount of that valuation. The bankrupt is now dead, and the whole sum having become payable (the obligation being in my judgment as I have said valid for payment of the money on his death) the trustees must, I think, be admitted to prove for this sum, not disturbing any former dividend.

The LORD JUSTICE TURNER.

In this case there was a legal debt of 10,000*l.*, with interest secured by bond. There was a contemporaneous deed by which it was declared that the obligees should stand possessed of the bond on trust, after the solemnization of the marriage, to allow the obligor to retain the money, or such part of it as he should think fit, in his hands during his life, or until he should become bankrupt or insolvent. Now the law would not permit the debt to be demanded on his bankruptcy, but it does not seem to me to follow that he was to be at liberty, against the express terms of the deed, to retain the money beyond his life. The sum was, therefore, as it appears to me, payable on his death. There was then a debt for value payable on the bankrupt's death, which, as my learned Brother has observed, might have been proveable not for the whole amount but upon a valuation as a debt payable in futuro. No attempt, however, appears to have been made to have a value set upon the debt and to be allowed to prove for the amount of the valuation. It would

would have been right to attach importance to the length of time which has elapsed if it could be shown that owing to lapse of time any change had taken place in the position of the assignees, or in the materials upon which the question has to be decided, but nothing of that kind is shown. I take the general rule to be, that so long as there remain undistributed assets in bankruptcy a creditor is entitled to come in and prove, as is the case in an administration suit so long as there are assets unadministered. I am, therefore of opinion that, the obligor now being dead, the trustees are entitled to come in and prove for the 10,000*l.*, not disturbing former dividends.

1860.

Ex parte
BODDAM.
Re
TAYLOR.

Ex parte HENRY CLARK.

In the Matter of JAMES LUND COPELAND, a
Bankrupt.

THIS was a petition by the surviving trade assignee by way of appeal from an order of Mr. Commissioner *Perry* dismissing with costs a petition to annul the adjudication.

The bankruptcy took place in 1852. The certificate was wholly refused on the ground that the bankrupt had in the year preceding his bankruptcy lost more than 200*l.* by time bargains in shares; *Ex parte Copeland, In re Copeland (a).*

Nov. 12.
Before The
Lords Jus-
tices.

A relation of
a bankrupt
agreed to pur-
chase all the
undistributed
assets at a
price much
above their real
value, upon
condition that
the adjudica-
tion should be
annulled. A
petition was
then presented

The

(a) 2 *De G., M. & G.* 914.

by the trade assignee, with the consent of all the creditors and with the concurrence of the bankrupt, to annul the adjudication, and was dismissed by the commissioner, because the certificate had been absolutely refused, on account of the bankrupt's having lost more than 200*l.* by time bargains in stock during the year before his bankruptcy, but on appeal the prayer of the petition was granted.

1860.

Ex parte

CLARK.

Re
COPELAND.

The whole of the bankrupt's estate had been distributed before the presenting of the petition to annul, with the exception of a reversionary interest in the estate of the bankrupt's deceased father. This interest was of a very unsaleable description, and the assignee had not succeeded in selling it. Under these circumstances a relation of the bankrupt entered into a contract with the assignee to purchase it for a sum considered to be much above its real value, subject to the condition that the bankruptcy should be annulled. The surviving trade assignee thereupon presented a petition praying for the annulling of the adjudication, and all the creditors consented to the application, which was made with the concurrence of the bankrupt. The dividends which had been paid amounted to 1*s.* 3*d.* in the pound, and the purchase-money of the reversionary interest was calculated to produce a further dividend of about 6*½d.*

Mr. Commissioner *Perry* dismissed the petition on the grounds appearing in the following passages of his judgment:—

"Mr. *Robinson* cited authority to show that where, as in this case, all the creditors consent to the dismissal of the petition for adjudication, the order is of course. This is laid down in the case of *Ex parte Brown* (*a*), where the bankrupt was at the time under committal for want of proper answers to questions put by the Commissioner. Mr. *Robinson*, however, admitted that he could cite no case of a supersedeas under the old law, or of a dismissal of a petition under the present law, after the absolute refusal of a certificate, and I believe that no such case exists where the refusal was grounded upon any provision of the 201st section of the Bankrupt Law Consolidation Act. This is a case in which an offence incurable in itself has occasioned the refusal of the

the certificate. The want of proper answers to questions before the Commissioner during the progress of the bankruptcy was capable of being remedied by the submission of the bankrupt, a circumstance which probably induced the Lord Chancellor in *Ex parte Brown* to pronounce a decision at variance with the one pronounced by him in *Ex parte Bean* (a), where he deemed the not answering to the satisfaction of the Commissioner, for which a committal had taken place, to be a great offence, and one which ought to be cured by surrender previously to the grant of a supersedeas. I therefore dismiss the petition."

Mr. Bacon and **Mr. Robinson** appeared for the Appellant.

Mr. De Gex, for the bankrupt, supported the appeal.

[**The LORD JUSTICE KNIGHT BRUCE** called attention to the circumstances, that if the adjudication were superseded the assignees might run some risk of having their proceedings under it called in question, and that the bankrupt might be liable to be sued for the unpaid portion of his debts.]

Mr. De Gex said that the bankrupt would undertake to confirm all the acts of the assignees, and thus free them from all liability, and that he was willing to run the risk of being sued for the residue of his debts.

[**The LORD JUSTICE TURNER** asked what was to be done as to the purchase-money of the reversion.]

Mr. Bacon said that the Appellant would undertake to distribute it among the creditors.

The order was then made for annulling the adjudication.

(a) 1 *Rose*, 211.

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D.P.J.

1860.

Ex parte
CLARK.
Re
COPELAND.

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In the Matter of SAMUEL WHITFIELD MORGAN,
a Bankrupt.

Ex parte LEWIS PHILLIPS.

Nov. 12, 13,
24.

Ex parte JOHN MARNHAM.

Before The
LORDS JUS-
TICES.

P., a member
of the Stock
Exchange, ad-
vanced to *M.*,
another mem-
ber, on a de-
posit of foreign
railway shares,
a sum of
money equal

THESE were petitions for the allowance of proofs,
which had been rejected by the commissioner
having charge of the bankruptcy, upon the ground that
the transactions, in respect of which the proofs were
claimed to be made, were illegal and void under the
statute 8 & 9 Vict. c. 109, s. 18.

The

to their then market value, such sum to be repaid on the next settling day. According
to the rules of the Stock Exchange, if such a loan is not repaid on the day named, the
lender is entitled to retain the shares at the market price of that day, the difference
being paid by the lender to the borrower, or vice versa, according as the value of the
shares at the then market price exceeds or falls short of the sum lent. *M.* did not pay
on the day, but the difference was paid and the transaction carried on till the next
settling day as a loan of a sum equal to the market value of the shares on the day when
the original loan ought to have been paid, and so on from time to time, interest being
allowed in account. *M.* was at last declared a defaulter, and subsequently was ad-
judged bankrupt. *P.* took to the shares, which were worth less than the money due,
and claimed to prove for the deficiency. Held, reversing the decision of the Commissioner,
that this was not a wagering transaction, and that the proof must be admitted.

X., another member of the Stock Exchange, agreed to sell to *M.*, at a price then
named, 100 shares in a foreign railway, *X.* then having that number of shares. The
transaction was to be completed on the next settling day. The rules of the Stock Ex-
change in such cases are similar to those in the case of loans on deposit. *M.* did not
take up the shares on the day appointed, but the difference of the value was paid and
the transaction carried on to the next settling day, as a purchase, at the market price
of the then settling day, and so on from time to time. The shares remained with the
vendor, but the dividends were accounted for to *M.* Some months after the original
contract *X.* bought back twenty of the shares and accounted to *M.* for the price, and
the contract was carried on for the remaining eighty only. On *M.*'s being declared a
defaulter, *X.* took to the eighty shares, which were worth less than the price agreed
upon in the last continuation of the contract, and sought to prove for the difference.
Held, that looking at all the circumstances, and especially at the re-purchase of part of
the shares, the transaction must be considered to have been a bona fide contract of
sale, and not a scheme to cover a wagering bargain for payment of differences, and
that the proof, therefore, must be admitted.

The Petitioners and the bankrupt respectively were members of the *Stock Exchange* during the whole period over which the transactions in question extended, the Petitioners respectively being stock and share dealers or jobbers, and the bankrupt a stock-broker. The Petitioners respectively were still members of the *Stock Exchange* when these petitions were heard; but on the 28th of April, 1859, the bankrupt was declared to be a defaulter, and ceased to be a member of the association.

The transactions in question were entered into and conducted upon and subject to the rules and customs of the *Stock Exchange*, and it appeared in evidence that, according to those rules and customs, there are settling days, usually two in each month, appointed by the committee of the association, for the settlement of all transactions relating to foreign securities, and that in cases of loans upon such securities, or of sales of such securities, the lender or seller has the right, if the loan be not repaid or the purchase completed on the settling day, to sell the securities or take them at their then value in the market, and to be paid by the borrower or purchaser the deficiency, if any, he paying to the borrower or purchaser any surplus there may be of the price or value beyond the amount of the loan or purchase-money, and that in case the borrower or purchaser has been declared a defaulter, the lender or seller, if the loan or purchase-money be not paid within three days or such further time as may be agreed upon, is bound to take the securities at a price to be fixed by the officers of the association.

In the case of *Ex parte Phillips*, the Petitioner *Phillips*, on the 13th of November, 1858, lent the bankrupt *Morgan* 775*l.* on the deposit of one hundred *Luxembourg Railway Shares*, which were then at the market

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price

1860.
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Re  
*MORGAN.*  
Ex parte  
*PHILLIPS.*  
Ex parte  
*MARNHAM.*

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Re
MORGAN.
Ex parte
PHILLIPS.
Ex parte
MARNHAM.

price of 7*l.* 15*s.* per share, so that the loan was to the full amount of the value of the shares deposited. On each of the fortnightly days of settlement, down to the time of the bankrupt becoming a defaulter, the bankrupt paid to the Petitioner *Phillips* the interest on the loan, and when the shares had fallen in value, he also paid to the Petitioner *Phillips* the amount of the depreciation; but when the shares had risen in value the Petitioner *Phillips* paid the bankrupt the amount of the increase in value. Upon the bankrupt's being declared a defaulter, the Petitioner *Phillips* took the shares at the price fixed by the officers of the association, and the sum which he claimed to prove was 176*l.* 8*s.* 9*d.*, the balance which remained due to him after deducting the price at which he had taken the shares.

The Petitioner *Phillips* was examined before the Commissioner, and it appeared from his examination that the 775*l.* was actually paid by him to the bankrupt, and that the one hundred shares were actually deposited with him by the bankrupt. He proved the payment of the interest and of the deficiencies and surplus as stated above. It appeared that his books were produced before the Commissioner, and that the entries in them agreed substantially, if not exactly, with his statements. He also deposed that the transaction of the 13th of *November*, 1858 was an absolute and bona fide loan without any further condition or understanding, and in effect that each settlement was a renewal of the loan, and he stated that loans of this description were common on the *Stock Exchange*, that it was optional with him, and with the bankrupt also, to renew the loan or close it on each of the settlements, and that it was usual with these loans that the amount should increase or decrease according to the value of the shares. The Commissioner, however,

ever, thought that the transaction was a gambling one, and accordingly rejected the proof.

The case stated by Mr. *Marnham* was as follows:— On the 27th of *March*, 1858, the bankrupt agreed to purchase from him one hundred new shares in the *Great Western Railway Company of Canada* at 11*l.* 10*s.* per share, the purchase to be completed on the next settling day. Mr. *Marnham* was actually possessed of shares to that amount. The transaction was not completed on the day named, but was carried on from settling day to settling day, Mr. *Marnham* or the bankrupt, as the case might be, paying the difference of value on each settling day, and the contract being renewed for the next settling day at the market price for the day on which the contract was renewed. The shares remained in Mr. *Marnham's* possession, but the bankrupt was credited with all dividends that accrued on them.

On the 2nd of *August*, 1858, Mr. *Marnham* re-purchased twenty of the shares from the bankrupt at 10*l.* 10*s.* per share, being the then market price, and the contract was renewed for the eighty remaining shares. On the bankrupt's being declared a defaulter, Mr. *Marnham* took to these eighty shares at a price fixed by the association, which was less than the market price of the day on which the last renewal of the contract had taken place. A balance thus remained due to him of 142*l.* 14*s.* 5*d.*, for which he sought to prove; but this proof also was rejected by the Commissioner, as arising out of a wagering transaction.

Mr. *Bacon* and Mr. *De Gex*, for Mr. *Phillips*, in support of his appeal.

This was a perfectly legal transaction, not touched by
8 & 9

1860.

Re
MORGAN
Ex parte
PHILLIPS.
Ex parte
MARNHAM.

1860.
Re
MORGAN
Ex parte
PHILLIPS
Ex parte
MARSHAL

8 & 9 Vict. c. 109, s. 18; *Ashton v. Dakin* (a). The money was actually advanced, and the amount of the loan was varied according to the fluctuations in the value of the security. There is no element of wagering in the case. Mr. Phillips could not in any event get more than his original loan with interest.

Mr. Daniel and *Mr. Bagley*, for the assignees, contended that the transaction was in substance a succession of bets upon the price of the shares in question.

Mr. Bacon and Mr. De Gex, for Mr. Marnham, in support of his appeal.

This is a clear case of bonâ fide purchase. The price was fixed at first; the contract was one which, according to the rules of the *Stock Exchange*, must have been completed at the next settling day, unless both parties had agreed to postpone it. Each postponement was in effect a new contract, substituted for the old one. The re-purchase of part of the shares shows that there was a bonâ fide contract of sale.

Mr. Daniel and Mr. Bagley, for the assignees.

We contend that this was a colorable transaction, intended to cover a speculation on the rise or fall of the price of the shares. *Grisewood v. Blane* (*b*) establishes that where there is a mutual understanding that the goods bargained for are not to be delivered on the future day, but only the difference of the market price accounted for, the transaction is a wagering one. In that case, as here, the price was fixed at the time of the contract. The whole case turns on a question of fact, was there any real intention to buy and sell these shares? [The LORD JUSTICE TURNER: In *Grisewood v. Blane* the jury

(a) 7 W. R. 384, Exch.

(b) 11 C. B. 526.

jury came to the conclusion that there was not any real contract for sale; here there was a contract which, according to the rules of the *Stock Exchange*, must have been completed on the day named, if either party had insisted on it.] The rules of the *Stock Exchange* would be satisfied if the difference of price were paid. There is nothing in those rules requiring the contract to be carried out in specie; so the case resembles *Grisewood v. Blane*, in which one of the points found by the jury was that the transaction was one in which it was only intended that there should be a settlement by payment of differences. Here on the first settling day, if the shares have risen in price, the vendor retains the shares and pays the purchaser a sum of money. It is impossible to conceive a *bona fide* contract for sale, with such an incident annexed to it.

Mr. *Bacon*, in reply.

In the first case there was a loan, upon such terms that the lender could not, in any event, get anything but his principal, with interest at a fixed rate. In the second case the purchaser might, on any settling day, have claimed to have the shares delivered. There is no wagering in either transaction.

Judgment reserved.

The LORD JUSTICE TURNER, after stating the facts of
Phillips's Case, as above, proceeded as follows:—

Nov. 24.

Upon considering the case, I have been unable to bring my mind to the conclusion at which the learned Commissioner arrived. The rules of the *Stock Exchange* which entered into this transaction rendered it necessary that on each settling day the transaction should be

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MORGAN.
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PHILLIPS.
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MARNHAM.

be either closed or renewed. It was not closed, and upon its being renewed it would seem to be of course that the difference on the one side or the other should be paid. There was a new loan according to the then price of the shares. In no case could the Petitioner receive more than the amount advanced by him and the interest upon that advance. If the shares fell in value the bankrupt repaid part of the loan. If they rose in value the Petitioner made a further advance. It was argued, on the part of the assignees, that the transaction was nothing more than a succession of bets on the value of the shares, the bankrupt paying the difference if the shares fell and receiving it if they rose, and that the loan transaction was merely to cover the betting; but whatever my opinion might have been upon the case had there been no money advanced, no deposit of shares, and no taking to the shares by the Petitioner, I think the proof of the advance, the deposit, and the ultimate settlement by the Petitioner, wholly displace the case suggested on the part of the assignees, and that this proof, therefore, must be admitted.

The case of *Ex parte Marnham* differs from the foregoing one. In this case there was an alleged sale by the Petitioner *Marnham* to the bankrupt of one hundred Great Western of Canada New Shares on the 27th of March, 1858, at 11*l.* 10*s.* per share, making 1,150*l.* The differences were paid on each settling day by the bankrupt to the Petitioner, and by the Petitioner to the bankrupt, as in *Phillips's Case*, and the account was finally settled, as in that case, by the Petitioner taking the shares at their value, leaving a balance of 142*l.* 14*s.* 6*d.* in favor of the Petitioner, which is the amount for which he claimed to prove; but in this case there never was any delivery of any shares. If the case had rested here, I should have felt considerable doubt upon it, and, having regard

regard to the case of *Grisewood v. Blane*, I am not satisfied that we could properly have admitted the proof without some further investigation before a jury or otherwise; but it appears that when any dividends were paid upon the shares, those dividends were accounted for to the bankrupt, and that on the 2nd of *August, 1858*, the Petitioner repurchased from the bankrupt twenty of the shares at their then market value, and accounted to him for the price. The mere payment of the dividends might not perhaps have altered the case, as it is not necessarily inconsistent with the whole transaction having been fictitious and a mere cover for the payment of the differences; but I think the re-purchase of the twenty shares and the payment of the price for them is inconsistent with that view, and stamps the transaction with the character of reality; and I am of opinion, therefore, that this proof also must be allowed.

I think all the costs in both cases should be paid out of the estate.

The LORD JUSTICE KNIGHT BRUCE.

I also consider that in neither of these cases was there any wager, or any contract or agreement by way of gaining or wagering. In my judgment, therefore, the disputed proofs ought to be admitted; and I concur in the view of the Lord Justice that the costs in both cases ought to be paid out of the estate.

1860.
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Re  
MORGAN.  
Ex parte  
PHILLIPS.  
Ex parte  
MARSHAM.

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## Ex parte WILLIAM HOPTON WYLD.

In the Matter of JOHN HOPTON WYLD, a  
Bankrupt.*Nov. 14, 15.*Before The  
LORDS JUS-  
TICES.*Dec. 5, 21.*Before The  
Lord  
Chancellor  
LORD  
CAMPBELL  
and The  
LORDS JUS-  
TICES.

*A.* accepted a bill of exchange, but became bankrupt before it fell due. On its coming due, *B.* paid it for the honor of *A.*, but there was no protest of the bill for non-payment, nor did *B.* make any formal statement that he paid it for the honor of *A.* *B.* then claimed to prove for the amount of the bill.

The question whether he was entitled to prove was by him and the assignees referred to arbitration, without any such authority as is required by sect. 153 of the Bankrupt Law Consolidation Act. *B.* never repudiated the reference, but argued the case on its merits before the referee, and took up the award, by which the referee decided that there was no right of proof.

*Held*, that, whether an award under such a reference could have bound the estate of the bankrupt or not, *B.* having taken the chance of having a decision in his favor, could not object to the validity of the award on the ground of the non-compliance with the requisitions of the act.

Per the Lord Justice *Turner*. The reference being unauthorized, this award could not have bound the estate nor the Commissioner.

Per the Lord Justice *Knight Bruce*. Apart from the award, *B.* would have been entitled to prove.

THIS was a petition by *William Hopton Wyld* for the allowance of a proof against the estate of the bankrupt for 772*l. 4s. 6d.*

On the 22nd of *May*, 1857, Messrs. *Otard & Co.* of *Cognac*, in *France*, drew upon the bankrupt for value a bill of exchange for the above sum, payable at three months, and indorsed it to their agent Mr. *Levaux*. It was accepted by the bankrupt, but his bankruptcy took place before it became due. It became due on the 25th of *August*, 1857, and on the 27th *William Hopton Wyld* paid it for the honor of the acceptor. There was no protest of the bill for nonpayment and no formal declaration or statement of its being paid for the honor of the acceptor; but it was in the usual course noted for non-payment.

In *December*, 1857, the Petitioner applied to the Commissioner

Commissioner to be allowed to prove for the amount of the bill, but the proof was objected to by the assignees upon the grounds that the bill had not been protested and that the bankrupt's estate had a set off against the Petitioner. In consequence of these objections the Commissioner refused to admit the proof, but allowed a claim to be entered. The question of set-off became the subject of an action at law and was decided in favor of the Petitioner, who then renewed his application for the admission of the proof. The assignees opposed on the ground that the bill had not been protested, and it was thereupon agreed between the assignees and the Petitioner that the question whether the Petitioner was entitled to prove as the holder of the bill should be referred to arbitration. This agreement was not made in conformity with the provisions of the statute, it was not authorized by any meeting of creditors, nor was it sanctioned by the Commissioner. The arbitration however proceeded, the Petitioner attended by counsel and contended in favor of his right to prove, and in the result the arbitrator awarded that the Petitioner was not entitled to prove as holder of the bill. The Petitioner took up the award, and finding it adverse made a further application for the admission of the proof, and the Commissioner having refused to admit it he appealed from that decision.

*Mr. Bacon and Mr. Coleridge for the Petitioner.*

This proof is resisted on the technical ground that protest was necessary. We contend that protest is not necessary for the purpose of proving against the estate of the acceptor, though it is necessary as against other parties to the bill, and that we are entitled to prove in respect of the payment. The award decides no more than that the Petitioner cannot prove in the character of holder. The rule as to the necessity of protest is no doubt

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doubt laid down in general terms in the text books, but the reasons given for it by the cases do not apply to an acceptor; *Hoare v. Cazenove* (*a*); *Williams v. Germaine* (*b*). The Commissioner replied to this that a rule often extended further than the reason on which it was founded, but there is no case in the books in which the rule has been applied in favor of an acceptor. *Mertens v. Winnington* (*c*), lays down the rule in terms favorable to our view. The proof may be supported on the ground that this was money paid to the bankrupt's use; *Barclay v. Gooch* (*d*); *Grissell v. Robinson* (*e*).

Mr. *Baily* and Mr. *H. T. Cole* for the assignees.

We say that the award is conclusive, the assignees having power to refer to arbitration, though they incur risk by doing so without the proper sanction; *Russell on Awards* (*f*). But if this be not so, we say that the arbitrator's decision is right in point of law. A moral obligation gives no claim, either at law or in equity. The Petitioner cannot avail himself of the *lex mercatoria* because there has not been a protest which that law requires; *Byles on Bills* (*g*); *Chitty on Bills* (*h*); *Vandewall v. Tyrrell* (*i*); *Geralopulo v. Wieler* (*k*). *Mertens v. Winnington* is a mere loose note, and the point does not appear to have been in question, and apart from the law merchant the case is nothing more than that one man voluntarily pays another man's debt without having been requested so to do, which, whatever moral claim it may raise, certainly gives no right at law or in equity, *Sleigh v. Sleigh* (*l*). *Barclay v. Gooch* was a clear case, there being a liability as surety, and in *Grissell v. Robinson* there

(*a*) 16 *East*, 391.

(*g*) *Page* 231.

(*b*) 7 *B. & C.* 468.

(*h*) *Pages* 238, 338, 340.

(*c*) 1 *Esp.* 113.

(*i*) 1 *Moo. & Malk* 87.

(*d*) 2 *Esp.* 571.

(*k*) 10 *C. B.* 690.

(*e*) 3 *Bing. N. C.* 10.

(*l*) 5 *Exch.* 514.

(*f*) *Page* 40.

there was a liability which was held to supply the want of an actual request.

Mr. *Bacon* in reply.

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WYLD.*

*Their Lordships* reserved judgment, but afterwards desired that the case might be re-argued before the full Court.

Mr. *Bacon* for the Appellant.

The award could not decide the question, for the reference not having been sanctioned by the Commissioner the award could not bind the assignees or the estate; 12 & 13 Vict. c. 106, ss. 153, 154; and if not binding on them it could not be binding on the other party. Then as to the merits of the award, I contend that the reasons for requiring protest do not apply where the acceptor is the person sought to be made liable. The reason why protest is required is that the parties liable on the bill may have formal notice, accredited by a notarial act, that the bill is dishonored, and that they will be called upon to pay it. There is reason in this as regards parties not primarily liable, but there is no reason for requiring such formal notice to a person who is the person primarily liable to pay. [The LORD CHANCELLOR. There is good sense in the distinction you draw, but the language of all the cases is that a person who takes up a bill for honor must have it protested.] That no doubt is so, but none of the cases called for the distinction which I now urge, and the decisions do not extend to the case of the acceptor. The bill is a negotiable instrument, and the case therefore does not at all resemble the case of a man's paying an ordinary simple contract debt without any request from the debtor.

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Before The  
Lord  
Chancellor  
Lord  
CAMPBELL  
and The  
LORDS  
JUSTICES.*

Mr.

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## Mr Cole for the assignees.

The reference to arbitration was proposed by the solicitor of the Appellant, so that even if the award, had it been the reverse of what it is, would have been invalid as against the estate, it does not lie in the mouth of the Appellant to object to it. But I contend that the reference was perfectly good and within the powers of the assignees; *Smith Merc. Law*(a); *Russell on Awards*(b); *Piercy v. Roberts*(c). The only effect of the want of the proper sanction is to make the assignees personally liable to the creditors, if the result of the arbitration is disadvantageous to the estate; *Jones v. Yates*(d); *Ex parte May*(e); *Casborne v. Barsham*(f). But at all events the Appellant is estopped from disputing the award; *Harrop v. Bayley*(g); *Ormes v. Beadel*(h). But even if the award is not binding, the Appellant is not entitled to prove. This cannot be treated as a payment made for the honor of the acceptor, the requisite forms not having been observed; *Smith Merc. Law*(i); *Chitty on Bills*(k), and see the forms of protest(l); *Vandewall v. Tyrrell*(m); *Geralopulo v. Wieler*(n); *Goodall v. Polhill*(o). The protest informs the acceptor in whose hands the bill is, and ought not to be dispensed with in his case, there is therefore no reason for restricting the general language of the cases, so as to make it not apply to an acceptor. In *Byles on Bills*(p), protest by the drawer is mentioned, now the drawer could not protest against any one but the acceptor, for no one else

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(a) *Page* 648.(b) *Page* 40.(c) 1 *M. & K.* 4.(d) 3 *Y. & J.* 373.(e) 4 *Decac.* 60.(f) 6 *Sim.* 317.(g) 25 *L. J., Mag. Ca.* 107.(h) 2 *D. F. & J.* 333.(i) *Page* 242.(k) *Pages* 238, 240 (10th ed.)(l) *Page* 462 (9th ed.); *ib.* 316

(10th ed.)

(m) 1 *Moo. & M.* 87.(n) 10 *C. B.* 690.(o) 1 *C. B.* 233.(p) *Pages* 231, 232.

is liable to him on the bill. It is said that in *Mertens v. Winnington* there was no protest, but that does not appear.

Mr. *Bacon* in reply.

Whatever power the assignees may have to make a binding submission to arbitration in matters relating to the property of the bankrupt, they cannot have any power to withdraw a question of proof from the judicial cognizance of the Commissioner by a reference not properly sanctioned. The award therefore is invalid.

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Re

WYLD.

Judgment reserved.

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*The LORD CHANCELLOR.*

I am of opinion that the decision of the Commissioner in this case ought to be affirmed, on the ground that the award of the arbitrator against the claimant is conclusive. He claimed to prove as a creditor of the bankrupt for the sum of 772*l. 4s. 6d.*, as holder of a bill of exchange for that amount drawn by *Otard, Dupuy & Co.* of *Cognac*, upon, and accepted by, the bankrupt, which the claimant alleged that he, after it was dishonored for nonpayment, took up and paid for the honor of the acceptor. The assignees denied his right to prove. This was a mixed question of fact and law depending upon what passed when the claimant obtained possession of the bill, and upon the custom of merchants respecting bills of exchange. According to the statement of the Commissioner "By agreement between the claimant and the assignees the right of the former to prove against the estate was left to arbitration, the precise question submitted to the arbitrator being, whether the claimant could

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1860.

Ex parte

WYLD.

Re

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could prove as holder of the bill? The arbitrator decided that the claimant had no such right, and the award still remains in force."

During the discussion before the Commissioner no objection was made to the legality of the submission or to the validity of the award, and the claimant's counsel, admitting that it was a bar to his claim to prove against the estate as holder of the bill, only contended that notwithstanding the award he was entitled to prove against the estate for money paid by him to the use of the bankrupt. Mr. *Bacon*, counsel for the claimant before us, most properly (as might be expected from him) conceded that proof as holder of the bill and proof for money paid to the use of the bankrupt were only variations of the form of procedure for the same right, and that if the one was barred by the award so was the other. But he powerfully argued, first, that irrespective of the award the claimant had a right to prove, although he had taken up and paid the bill for the honor of the acceptor without a protest, which would have been necessary as to the drawer or indorser of a bill; and secondly, that the award was void by the operation of section 153 of 12 & 13 Vict. c. 106, which enacts that "with leave of the Court first obtained and subject to such conditions, if any, as the Court shall think fit to direct, the assignees may submit to arbitration any difference or dispute between the assignees and any other person for or on account or by reason of anything relating to the estate and effects of the bankrupt." It is admitted that in this case the submission to arbitration of the difference between the claimant and the assignees was without the leave of the Court first obtained for that purpose.

But I am of opinion that it is not competent to the claimant now to make this objection. He agreed to the arbitration,

arbitration, he attended the arbitrator, he adduced evidence before the arbitrator, and by his counsel he argued that he was entitled to the award; he actually took up the award in the hope that it might be in his favor, and if this had been so, there can be no doubt that he would have been admitted to prove his claim against the estate without further difficulty. A number of authorities (to which might be added *Lee v. Sangster* (*a*) ) were cited, to show that the want of the leave of the Court would not invalidate the award, although it might subject the assignees to penal liability for submitting such a difference to arbitration without the leave of the Court. But the ground on which I proceed is, that the claimant cannot now be heard to make the objection. Having acted fully under the submission and taken the chance of having an award in his favor, he cannot now seek to get rid of the award against him on account of an informality in the submission, even if this objection might have prevailed if taken in due time; the cases of *Jones v. Powell* (*b*), and *Wrightson v. Bywater* (*c*), are expressly in point. I myself laid down and acted upon the same principle during the last term in *Orme v. Beadel*, where the bill being filed to set aside an agreement to submit to arbitration on the ground that it had been fraudulently obtained, proof being given that the Plaintiff had voluntarily and deliberately acted under the submission and had made no complaint of the proceeding till he found the award was against him, I adjudged that his bill should be dismissed with costs.

In the present case it is admitted that, if the award is considered valid, there is no ground for the appeal, as  
the

(*a*) 2 C. B. 1.

(*b*) 6 Dowl. 483.

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(*c*) 3 Mee. & Wels. 199.

X X

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Re

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Ex parte  
W.Y.L.D.Re  
W.Y.L.D.

the claimant cannot prove for money paid if he cannot prove as holder of the bill.

I am, therefore, not called upon to give any opinion upon the difficult question whether, when a bill of exchange has been dishonored for nonpayment, a stranger by paying for the honor of the acceptor without a protest can make himself a creditor of the acceptor for the amount. But I think it right to say that *Mertins v. Winnington* (a) cannot be considered an authority for the doctrine that, where a person without a protest takes up a bill of exchange for the honor of any one whose name is on the bill, he becomes, as indorsee of the bill, entitled to all remedies against those whose names are on it. I should rather infer, that in that case the Plaintiff paid the bill for the honor of *Burton, Forbes* and *Gregory* the indorsers after the bill had been protested, and to suppose that without a protest the Plaintiff by payments acquired all the rights of indorsee would be subversive of the custom of merchants on this subject, acknowledged by all commercial nations.

I am of opinion that the appeal should be dismissed, but without costs.

*The LORD JUSTICE TURNER.*

I agree in opinion with the Lord Chancellor in this case. It is not, I think, necessary for us to give, and I do not mean to give, any opinion upon the question whether, in the case of the payment of a bill for the honor of the acceptor, a protest is necessary to entitle the person who has made the payment to sue the acceptor upon the bill, for I am of opinion that the Petitioner is bound by the award. It is true that the award

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(a) 1 *Esp.* 113.

is not made in conformity with the provisions of the statute. It is not made with the leave of the Court. It could not, therefore, as it seems to me, in any manner bind the estate of the bankrupt, and still less, as I think, could it bind the Commissioner in the exercise of his judicial functions. If, therefore, the question had been whether the estate of the bankrupt, or the judgment of the Commissioner, could be affected by the award, I should have felt no difficulty upon it, but the question is, whether the Petitioner is not bound by the award. It was quite competent to him to agree to be bound by the decision of the arbitrator, and the only case which, as it seems to me, he can set up against the award is, the want of mutuality—that the award, if against him, could be enforced, if in his favor could not be enforced. The Petitioner, however, must be taken to have known that this was the case when he entered into the reference, and having known that neither the estate of the bankrupt, nor the judgment of the Commissioner, could be bound by the result of the reference, he must, I think, in entering into it, be taken to have meant to contract only for such benefit as the weight of the arbitrator's judgment, if in his favor, might confer upon him; the influence which it might have in the settlement of the question between him and the bankrupt's estate. He has taken the chance of obtaining that benefit, and having taken that chance he ought, in my opinion, to be bound by it now that it has turned against him. This principle has been acted upon at law in the cases of *Wrightson v. Bywater* (*a*), and *Jones v. Powell* (*b*), and those decisions seem to me to apply to this case.

It was much pressed in argument on the part of the Petitioner, that he was entitled to be considered as the holder

(*a*) 3 *M. & W.* 199.

(*b*) 6 *Dowl.* 483.

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Re

WYLD.

holder of an overdue bill, and to prove in that character, but the award seems to me to reach the Petitioner in that character also, and even if the award could be laid out of the case, I think the proof could not be allowed on this ground. The Petitioner having taken the bill by payment for the honor of the acceptor, could not, I think, be permitted to say that he took it by transfer from the holder. The rights in the one case and the other would be wholly different.

It has been suggested, too, that the Petitioner was entitled to prove on this ground, that whatever might be the right at law, an equity would attach upon the holder in favor of the person by whom he was paid; but it seems to me to be an answer to this, that the holder was paid, and that no equity, therefore, could be asserted through him. It may be added, too, that to support such an equity would be wholly to alter the effect of a payment for honor. Where there is a payment of a bill for the honor of the acceptor or indorser, the person who pays has a remedy upon the bill against the acceptor, and in the case of an indorser, against him and all prior indorsers. He has no right or remedy against subsequent indorsers, but if the holder was to be held to be a trustee for him he would have a remedy against the subsequent indorsers. Upon these grounds I agree in opinion with the learned Commissioner, that the Petitioner is not entitled to prove, and this petition, therefore, must be dismissed; but it must be dismissed without costs.

*The LORD JUSTICE KNIGHT BRUCE.*

Independently of the award I think the claim of the Petitioner well founded. In my opinion he was at the time when his proof was carried in entitled to prove. The award, however, has considerably embarrassed me.

1860.

In the Matter of the UNITED GENERAL BREAD  
AND FLOUR COMPANY, for PLYMOUTH,  
DEVONPORT and STONEHOUSE.

Ex parte HIRTZEL.

THIS was the appeal of Mr. *Hirtzel*, the official assignee and official liquidator of the above-named company, from the refusal by Mr. Commissioner *Biggs Andrews*, of the *Exeter* District Court of Bankruptcy, to commit Mr. *Avery*, a contributory to the debts and liabilities of the above-named company, for non-payment of a call in obedience to an order of the district Court which had been duly served upon him.

The company was established in 1846, under the provisions of the Joint Stock Companies Act, 7 & 8 Vict. c. 110.

In November, 1847, Vice-Chancellor *Wood* made an order for winding up the company, and under the power given to him by the Joint Stock Companies Act, 1856, 19 & 20 Vict. c. 47, s. 74, directed that the further proceedings should be had in the Court of Bankruptcy of the *Exeter* district, within the jurisdiction of which the registered office of the company was situate.

Mr. *Avery* was placed upon the list of contributors in respect of one share, upon which in the course of the winding up a call of 4*l.* was made, and an order for payment served upon him.

This order not having been duly attended to a peremptory order for payment was served upon Mr. *Avery* in

*Nov. 15.  
Before The  
LORDS JUS-  
TICES.*

Where an order to wind up a joint stock company has been made in Chancery, and under the power given to the Court by the Joint Stock Companies Act, 1856, s. 74, the subsequent proceedings for winding up the company have been remitted to the District Court of Bankruptcy within the jurisdiction of which the registered office of the company is situate, the Commissioner of the District Court has jurisdiction to commit a contributory for disobedience to an order for a call duly made and served upon him.

*July,*

1860.

In re  
 THE UNITED  
 GENERAL  
 BREAD AND  
 FLOUR  
 COMPANY, &c.  
 Ex parte  
 HIRTSZEL

*July, 1860.* This order having been wholly disregarded by Mr. *Avery*, an application was made to the Commissioner for his committal.

The Commissioner refused to make any order, doubting his jurisdiction to commit.

Mr. *Selwyn* and Mr. *Lopes* in support of the petition of appeal.

The Court of Bankruptcy has always had inherent power under its original jurisdiction to enforce its orders by commitment; and this power is expressly recognized and continued by the Bankrupt Law Consolidation Act, of 1849, sect. 6, which enacts that "The Court of Bankruptcy shall continue to be a Court of Law and Equity for the purposes of this act, and shall continue to be a Court of Record, and the records and proceedings of every kind at the commencement of this act in the said Court in *London*, and in the several districts in the country, shall be kept as such records and proceedings in like manner in the Court so continued, and the said Court and every Commissioner thereof shall have and use all the powers, rights, incidents and privileges of a Court of Record, and all other rights, incidents and privileges as fully to all intents and purposes as the same are used and enjoyed by any of her Majesty's Courts of Law or Judges at *Westminster*, and each and every of the Commissioners for the time being acting in *London* and in the several districts in the country shall, singly and simultaneously or otherwise as occasion may require, be and form the Court for every purpose under this act, or in execution of any duty which may hereafter be imposed upon the Court, except where otherwise specially provided." And by section 99 of the Joint Stock Companies Act, 1856, it is provided, that until the rules therein mentioned are made, which, however, have not

not yet been made, any order made by any Commissioner of Bankruptcy in proceedings under the act, may be enforced in the same manner in which orders made in proceedings within the ordinary jurisdiction of the Courts of Bankruptcy are enforced.

Further, by section 11 of the Joint Stock Companies Amendment Act, 1858, the 21 & 22 Vict. c. 60, it is enacted, that the practice hitherto in use in the Court of Chancery in *England* in winding-up companies under "The Joint Stock Companies Winding-up Act, 1848," and "The Joint Stock Companies Winding-up Act, 1849," and all powers and jurisdictions given to the said Court of Chancery by the said acts, and not conferred by the Joint Stock Companies Acts, shall be applicable to the winding-up under the said Joint Stock Companies Acts of companies by the Courts of Bankruptcy in *England*, until rules for regulating such winding-up are made in pursuance of the powers for that purpose given by the said Joint Stock Companies Acts; and that the Courts of Bankruptcy in *England* may adopt such practice, powers and jurisdictions to the same extent as if the companies were being wound up under "The Joint Stock Companies Winding-up Act, 1848," and "The Joint Stock Companies Winding-up Act, 1849."

It is submitted, therefore, that both under the original jurisdiction of the Court of Bankruptcy, and under the enactments above stated, the Commissioner has ample power to commit.

Mr. Avery did not appear either personally or by counsel.

*The LORD JUSTICE KNIGHT BRUCE.*

We are of opinion that there is jurisdiction in the Commissioner to commit where an order for payment of a call

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THE UNITED  
GENERAL  
BREAD AND  
FLOUR  
COMPANY, &c.

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HIRTSEL.

1860.

In re  
THE UNITED  
GENERAL  
BREAD AND  
FLOUR  
COMPANY, &c.  
*Ex parte*  
HIRTZEL.

a call has been duly served and not obeyed, and we consider it not incumbent on the Commissioner to enquire into the regularity or irregularity of any previous proceeding, nor upon the official liquidator to ascertain beforehand whether the contributory is or is not able to pay.

*The LORD JUSTICE TURNER concurred.*

#### Ex parte THOMAS TREHERNE.

In the Matter of HENRY SAUNDERS, against whom  
a Petition for Adjudication of Bankruptcy was  
filed on, &c.

Dec. 4.

Before The  
LORDS  
JUSTICES.

Where an act  
of bankruptcy  
had been com-  
mitted before  
a petition for  
arrangement  
was presented  
under the  
211th section  
of the act of  
1849: held,  
that a creditor  
was entitled to  
proceed under  
a petition for  
adjudication in  
bankruptcy,  
notwithstand-  
ing the pend-  
ency of the  
petition for  
arrangement,  
no resolu-  
tion having  
been pre-  
viously con-  
firmed by the  
Commissioner.

THIS was the appeal of the petitioning creditor  
against the decision of Mr. Commissioner *Evans*,  
annulling an adjudication of bankruptcy against the Re-  
spondent *Henry Saunders*.

On the 15th of *October*, 1860, the Respondent pre-  
sented a petition for arrangement with his creditors to  
the Court of Bankruptcy in *London*, under the 211th  
section of the Bankrupt Law Consolidation Act, 1849.

On the same day an order was made on the petition,  
granting protection until the 30th of *October*, and ap-  
pointing the first sitting to be held, under the petition,  
on the 15th of *November* then next.

On the 16th of *October* an order was made under the  
petition for arrangement, directing that the Respondent's  
estate should vest in *Patrick Johnson*, an official assignee  
of the Court of Bankruptcy, and be taken possession  
of

of by *James Cooper*, one of the messengers of the Court.

On the 5th of *November* the accounts of the Respondent were filed under his petition for arrangement.

On the 27th of *October* the Appellant, as one of the creditors of the Respondent, received notice from the Court of Bankruptcy that the petition for arrangement had been presented, under which protection from all process either against the Respondent's person or property had been granted, and that the first sitting under the petition for arrangement had been appointed to be held on the 15th of *November* then next.

On the 31st of *October* the Appellant learned for the first time, as the fact was, that the Respondent had on the 11th of *October* executed an assignment to a trustee of all the Respondent's estate and effects for the benefit of his creditors.

On the 31st of *October* the Appellant presented his petition for adjudication of bankruptcy against the Respondent.

On the proof of the Appellant's debt to the amount required by the statute, and of the trading of the Respondent, and of the execution by him of the deed of assignment, an adjudication in bankruptcy was made against him and a day appointed for his surrender.

In the deed of assignment was contained the following proviso :—" Provided always, and it is hereby expressly agreed and declared, that in case the said *Henry Saunders* shall, within two calendar months from the date hereof, deem it to be expedient and shall present a petition

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TREHERNE.  
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SAUNDERS.

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a petition for arrangement between himself and his creditors, under the 12 & 13 Vict. c. 106, s. 211, or shall sign a declaration of insolvency, then these presents shall be void, and the property and effects hereby assigned shall be administered under the superintendence and control of the Court of Bankruptcy."

On the 6th of *November* the Respondent gave notice to the Appellant and to the Court of Bankruptcy of his intention to dispute the validity of the adjudication, and also the petitioning creditor's debt, trading and act of bankruptcy upon which the adjudication had been grounded; and further gave notice that he should show that he, on the 15th of *October* then last prior to the adjudication, presented a petition to the Court of Bankruptcy under section 211 of the Bankrupt Law Consolidation Act, 1849, and that the proceedings thereunder were still pending, under which an official assignee had been appointed, and his estate, credits and effects had been and still were vested in the official assignee, and the usual order of protection had been granted to him, and that thereby the adjudication in bankruptcy against which he intended to show cause was null and void, and ought not to have been made.

On the 13th of *November* the matter of the disputed adjudication came on for hearing before Mr. Commissioner *Evans*, when all objections to the petitioning creditor's debt and the trading were waived, and the question of whether the Appellant had a right to obtain an adjudication of bankruptcy founded upon the act of bankruptcy of the 11th of *October*, was alone argued.

The Commissioner, after taking time to consider the matter, made an order on the 15th of *November* annulling the

the adjudication, upon the ground that after the petition for arrangement was filed nothing could be done with the Petitioner or his property except under the petition for arrangement, and that his having committed a previous act of bankruptcy made no difference.

*Mr. De Gex, Mr. Lucas and Mr. Brough* in support of the appeal.

There can be no doubt that the deed operated as an act of bankruptcy. The proviso, which may be relied upon on the part of the Respondent, does not prevent the execution of the deed from having that effect; *Tappenden v. Burgess* (*a*); *Dutton v. Morrison* (*b*); *Back v. Gooch* (*c*). Then, an act of bankruptcy having been committed, the petitioning creditor was entitled to an adjudication of bankruptcy as a matter of right. It was held, before the introduction of the arrangement clauses into the law of bankruptcy, that a commission of bankrupt was ex debito justitiae; *Backwell's Case* (*d*); *Ex parte Thompson* (*e*); *Ex parte Wilson* (*f*); *Ex parte Lanchester* (*g*); and those clauses contain nothing depriving a creditor of this right. The object of them is not to exclude an administration under a bankruptcy, but to prevent any one creditor from obtaining a preference over the rest by a process for his own benefit only. Therefore it has been held that bankruptcy is not process against which the protection of the arrangement clauses is effectual; *Ex parte Walker* (*h*); *Ex parte Dales* (*i*). This is a stronger case than those, since here the act of bankruptcy was complete before the petition for arrangement was filed, and in the cases cited it was only in progress towards completion.

They

(*a*) 4 *East*, 230.

(*f*) 1 *Atk.* 218.

(*b*) 17 *Ves.* 197.

(*g*) 17 *Ves.* 512.

(*c*) 4 *Campb.* 232.

(*h*) 6 *De G., M. & G.* 752.

(*d*) 1 *Vern.* 152.

(*i*) 2 *De G. & J.* 206.

(*e*) 1 *Ves. jun.* 157.

1860.  
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Ex parte
TREHERNE.
In re
SAUNDERS.

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Ex parte
THEHERNE.In re
SAUNDERS.

They also referred to *Blackford v. Hill* (*a*).

Mr. C. Swanston for the Respondent.

The case is not like those referred to, in which the proceedings towards arrangement had not commenced before the proceedings were taken in bankruptcy. It rather resembles *Ex parte Arnold* (*b*), where the Court held that where a petition for arrangement on adjudication of bankruptcy is obtained at the peril of the petitioning creditor, it will be annulled if the arrangement proceeds.

Mr. De Gex in reply.

Ex parte Arnold decided nothing, the order having been made by arrangement between the parties. It was, moreover, a totally different case, as there had been no act of bankruptcy committed before the petition for arrangement was filed. It might possibly be considered that a debtor, after petitioning for arrangement, did not commit an act of bankruptcy by not paying a debt which he could not pay consistently with the proceedings under the petition. But if it were so held, such a decision would not apply to a state of circumstances like the present. The case of *Ex parte Hills* (*c*), referred to in *Ex parte Arnold*, is much more to the point.

The LORD JUSTICE TURNER.

This is a petition to discharge the order of the Commissioner annulling the bankruptcy. There is no doubt that there was an act of bankruptcy, perfect and complete, before the petition for arrangement was presented. Several cases have been referred to, and among them

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(*a*) 15 Q. B. 116.

(*b*) 3 De G. & J. 473.

(*c*) 3 De G. & J. 476, note (*b*).

Ex parte Walker (*a*) ; *Ex parte Dales* (*b*) ; *Ex parte Hills* (*c*), and *Ex parte Arnold* (*d*). It has been suggested that these authorities are conflicting. But I think that the decision in *Ex parte Arnold* did not decide any point upon the construction of the statute. It was, I believe, disposed of upon an arrangement between the parties, for I observe from the notes in the Registrar's book of what passed on the hearing, that the Court was not asked, on the part of the creditor, who had issued the commission to maintain the bankruptcy, but that the creditor agreed to an order made by arrangement. The cases of *Ex parte Dales* and *Ex parte Walker* have not, I think, been departed from in any way. But it is said that the present case is distinguishable from *Ex parte Dales* and *Ex parte Walker*, in this respect, that the proceeding towards the arrangement had commenced before the proceedings in bankruptcy were instituted. The question, therefore, to be considered in that point of view is, whether the arrangement clauses of the 12 & 13 Vict. c. 106, are or are not sufficient to override the express provisions of the 101st and 104th sections of the same act. In my opinion they are not. I think that it is competent to a creditor, notwithstanding the pendency of a petition for arrangement, to file a petition for adjudication in bankruptcy.

In saying this, however, I desire to be understood as not referring to a case in which a creditor has lain by after a petition for arrangement has been presented, or has in any way sanctioned the proceedings under it. Much less do I mean to say that it is competent to a creditor to proceed to an adjudication in bankruptcy, after

(*a*) 6 *De G., M. & G.* 752.
(*b*) 2 *De G. & J.* 206.

(*c*) 3 *De G. & J.* 476, note.
(*d*) 3 *De G. & J.* 473.

1860.

Ex parte
TREHERNE.

In re
SAUNDERS.

1860.

Ex parte
TREHERNE.
In re
SAUNDERS.

after there shall have been an affirmation by the Commissioner of the arrangement. I leave such cases entirely untouched. In this instance there is nothing which can at all bind the petitioning creditor. I consider that we are bound to grant the prayer of the petition, and to discharge the order annulling the adjudication.

The costs of the appeal, and of the persons who have proceeded under the arrangement, should, I think, under the circumstances, come out of the estate.

The LORD JUSTICE KNIGHT BRUCE.

We both desire to be understood as guarding ourselves from saying what in our judgment would have been the proper decision if the Commissioner had approved the proposal under the arrangement clauses. He has not done so. Having regard to that fact, to the dates, and to the other circumstances, we are of opinion (and as to myself almost with regret, so far as I am able with propriety to express it) that, ex debito justitiae, this bankruptcy should be proceeded with.

AN
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THE PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

ADMINISTRATION SUIT.

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ACQUIESCE.

Decree setting aside an agreement as having been signed by the Plaintiff under circumstances amounting to pressure or duress, reversed, the Court of Appeal (without pronouncing upon the question of duress) being of opinion that the Plaintiff, with a knowledge of all the facts, had voluntarily acted under the agreement, and had done so to the prejudice of the Defendant. *Ormes v. Beadel.*

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See LACHES.

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See PRACTICE, 1.

AGREEMENT TO TAKE SHARES.

See SHARES, 2.

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See PRACTICE, 2.

ANNUITY.

A testator devised and bequeathed to trustees, their heirs, executors and administrators, all and singular his freehold, leasehold and copyhold estates, and also all his personal estate, of what nature or kind soever the same might be, upon trust to pay and make up to his wife 1,200*l.* per annum, including any sums of money to which she might be entitled under her late father's will, by equal quarterly payments, for and during the term of her natural life; and

directed, that from and after the decease of his wife the said sum of 1,200*l.* so to be paid to her should go and be equally divided unto and amongst all and every the testator's children who should be then living, share and share alike.

Held, that the gift was not of a perpetual annuity, but was limited to the lives of the testator's widow and children. *Lett v. Randall.* Page 388.

ANSWER.

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See SETTLEMENT.

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See POWER OF ATTORNEY.

BANKRUPTCY.

1. A shipbuilder assigned to a creditor an unfinished ship, and agreed to complete it at his own expense, the value of the finished ship to be set off against an equal amount of the pre-existing debt. This shipbuilder's course of trade was to build ships on his own account and sell them when completed. Before he had quite completed this ship he became bankrupt :

Held, that the ship did not pass to his assignees as being within his order and disposition.

The creditor having filed his bill to establish his right to the proceeds of the ship (which had been sold without prejudice under an arrangement between him and the assignees), the assignees by their answer submitted, that the assignment did not pass the property in the ship, and that if it did, the ship passed to them as being within the order and disposition of the bankrupt ; that the transaction was a mortgage and not a sale, and that it was not entered into for its ostensible purpose ; but they did not raise the point that the assignment was a fraudulent preference, or otherwise objectionable on the ground of fraud :

Held, that the case of fraud or fraudulent preference was not open to them ; and, per the Lord Justice *Turner*, it could not have been effectually raised without a cross bill ; and as the assignees had had ample opportunities of

- investigating the case in time to raise the case of fraud by their answer, leave ought not now to be given to file a cross bill for the purpose of raising it. *Holderness v. Rankin.* Page 258
2. *W.*, a chemist, allowed *S.*, who was an uncertificated bankrupt, to carry on business as a jeweller in the name of *W.*, but for his own benefit, *W.* making himself liable for the debts. Some persons to whom *S.* applied for goods asked *W.* whose the business was, to which he replied, that it was his, and that *S.* was carrying it on for him. *S.* absconded, carrying away all the goods belonging to that business, and *W.* shortly afterwards became bankrupt, almost all his debts being debts contracted by *S.* in the jewellery business:
- Held*, reversing the decision of the Commissioner, that the representation by *W.* that the business was his, was not a fraud disentitling him to a certificate. *Ex parte Wildbore. Re Wildbore.* 621
3. A man on his marriage gave to trustees a bond conditioned for payment of 1,000*l.* with interest. By a settlement of even date it was declared that the trustees should, during his life or until he should become bankrupt or insolvent, allow him to retain in his hands the 1,000*l.* or such parts of it as he should think fit. In 1826 he became bankrupt. The trustees in 1827 proved for the whole 1,000*l.*, but the commissioners expunged the proof, and the trustees did not take any steps to have a value set upon the bond as for a sum payable on the bankrupt's death, and to be allowed to prove for the amount of the valuation. In 1860, the bankrupt being dead, and fresh assets having come in, the trustees applied again to prove for the whole amount.
- Held*, that although the provision for calling in the money on bankruptcy was void, the debt was valid as a debt payable upon the death of the bankrupt, and that proof of it ought now to be allowed, not disturbing former dividends.
- Held*, that the decision in 1827 was not a judgment against the present claim, the debt not being then payable, and no attempt having been made to prove for it on the footing of its being payable in futuro. *Ex parte Boddam. Re Taylor.* Page 625
4. A relation of a bankrupt agreed to purchase all the undistributed assets at a price much above their real value, upon condition that the adjudication should be annulled. A petition was then presented by the trade assignee, with the consent of all the creditors and with the concurrence of the bankrupt, to annul the adjudication, and was dismissed by the commissioner, because the certificate had been absolutely refused, on account of the bankrupt's having lost more than 200*l.* by time bargains in stock during the year before his bankruptcy, but on appeal the

prayer of the petition was granted. *Ex parte Clark. Re Copeland*, 631

5. *P*, a member of the *Stock Exchange*, advanced to *M.*, another member, on a deposit of foreign railway shares, a sum of money equal to their then market value, such sum to be repaid on the next settling day. According to the rules of the *Stock Exchange*, if such a loan is not repaid on the day named, the lender is entitled to retain the shares at the market price of that day, the difference being paid by the lender to the borrower, or vice versa, according as the value of the shares at the then market price exceeds or falls short of the sum lent. *M.* did not pay on the day, but the difference was paid and the transaction carried on till the next settling day as a loan of a sum equal to the market value of the shares on the day when the original loan ought to have been paid, and so on from time to time, interest being allowed in account. *M.* was at last declared a defaulter, and subsequently was adjudged bankrupt. *P*. took to the shares, which were worth less than the money due, and claimed to prove for the deficiency. *Held*, reversing the decision of the Commissioner, that this was not a wagering transaction, and that the proof must be admitted.

X., another member of the *Stock Exchange*, agreed to sell to *M.*, at a price then named, 100 shares in a foreign railway, *X.* then having that number of shares. The

transaction was to be completed on the next settling day. The rules of the *Stock Exchange* in such cases are similar to those in the case of loans on deposit. *M.* did not take up the shares on the day appointed, but the difference of the value was paid and the transaction carried on to the next settling day, as a purchase at the market price of the then settling day, and so on from time to time. The shares remained with the vendor, but the dividends were accounted for to *M.* Some months after the original contract *X.* bought back twenty of the shares and accounted to *M.* for the price, and the contract was carried on for the remaining eighty only. On *M.* being declared a defaulter, *X.* took to the eighty shares, which were worth less than the price agreed upon in the last continuation of the contract, and sought to prove for the difference. *Held*, that looking at all the circumstances, and especially at the re-purchase of part of the shares, the transaction must be considered to have been a bona fide contract of sale, and not a scheme to cover a wagering bargain for payment of differences, and that the proof, therefore, must be admitted. *Re Morgan. Ex parte Phillips. Ex parte Marnham.*

Page 634

6. *A.* accepted a bill of exchange, but became bankrupt before it fell due. On its coming due, *B.* paid it for the honor of *A.*, but there was no protest of the bill for non-

payment, nor did *B.* make any formal statement that he paid it for the honor of *A.* *B.* then claimed to prove for the amount of the bill. The question whether he was entitled to prove was by him and the assignees referred to arbitration, without any such authority as is required by sect. 153 of the bankrupt Law Consolidation Act. *B.* never repudiated the reference, but argued the case on its merits before the referee, and took up the award, by which the referee decided that there was no right of proof.

Held, that, whether an award under such a reference could have bound the estate of the bankrupt or not, *B.*, having taken the chance of having a decision in his favor, could not object to the validity of the award on the ground of the non-compliance with the requirements of the act.

Per the Lord Justice *Turner*. The reference being unauthorized, this award could not have bound the estate nor the Commissioner.

Per the Lord Justice *Knight Bruce*. Apart from the award, *B.* would have been entitled to prove. *Ex parte Wyld. Re Wyld.*

Page 642

7. Where an order to wind up a joint stock company has been made in Chancery, and, under the power given to the Court by the Joint Stock Companies Act, 1856, s. 74, the subsequent proceedings for winding up the company have been remitted to the District

Court of Bankruptcy within the jurisdiction of which the registered office of the company is situate, the Commissioner of the District Court has jurisdiction to commit a contributory for disobedience to an order for a call duly made and served upon him. *Ex parte Hirtzel. Re United General Bread and Flour Company.* Page 653

8. Where an act of bankruptcy had been committed before a petition for arrangement was presented under the 211th section of the Act of 1849, held that a creditor was entitled to proceed under a petition for adjudication in bankruptcy, notwithstanding the pendency of the petition for arrangement, no resolution having been previously confirmed by the Commissioner. *Ex parte Treherne. Re Saunders.* 656

See ESTATE TAIL.

WINDING-UP ACTS.

BASE FEE.

See ESTATE TAIL.

BILL OF EXCHANGE.

See BANKRUPTCY, 6.

CAVEAT.

See INROLMENT OF DECREE.

CERTIFICATE.

See BANKRUPTCY, 2.

CHARITY.

1. The *Penzance Public Library* was established and kept on foot

by the subscriptions of certain inhabitants of *Penzance*, for the purpose of purchasing and preserving books for the use of such subscribers. The subscribers were elected by ballot, and the management of the library conducted, according to printed rules, by officers chosen by the subscribers from amongst themselves. By one of these rules it was provided, that the property in the books and everything else belonging to the library should be altogether vested in the officers for the time being, who should be trustees for the subscribers; and another rule provided that the institution should not be broken up so long as ten members remained:—*Held*, that a devise of freeholds to the trustees for the time being of the *Penzance Public Library*, to hold to them and their successors for ever, for the use, benefit, maintenance and support of the said library, was void, as tending to a perpetuity.

Carne v. Long. Page 75

2. By the terms of a scheme for the regulation of a charity for the presentation of exhibitioners to the universities, the exhibitioners were to be elected from boys "who shall have been" or "who have been" three years at the free grammar school of *W.* *Held*, that the boys to be elected were boys who had been three years at the school at the time of and immediately preceding the election.

It is not according to the course of the Court to remove persons

who have been elected as objects of a charity, upon an erroneous construction of the scheme for its regulation, where the election has been made bona fide and without fraud or corruption.

Petitioners seeking to have a construction put upon a scheme for the regulation of a charity, though induced mainly by private interest to apply to the Court, *held*, nevertheless, entitled to their costs out of the charity funds, there having been a bona fide substantial ground for the application. *In re Storie's University Gift.* Page 529

COLOURABLE TRANSFER.

See CONTRIBUTORY.

COMMISSION.

See LUNACY, 2.

COMPENSATION.

See VENDOR AND PURCHASER.

CONDITION.

A testator bequeathed 500*l.* to *J.*, his eldest son, with a proviso, that if the legatee should neglect to convey, within six months after request, his interest in the *B.* estate to *E.*, another of the testator's sons, the conditional gift was to become thenceforth wholly void. The testator, after the execution of his will, purchased all the legatee's interest in the *B.* estate for 300*l.*

Held, that the legatee was en-

titled to the *500l.*, discharged of the condition. *Walker v. Walker.*

Page 255

CONFIRMATION.

See ACQUIESCENCE.

CONSIDERATION.

See SETTLEMENT.

CONSTRUCTION.

1. A testator bequeathed a legacy upon trust for his widow for life, and after her death upon trust for *A.* and *B.* in equal shares. "And in case of the death of either of them in the lifetime of my said wife, then upon trust to pay the whole of the said trust fund unto the survivor of them the said *A.* and *B.*, his executors, administrators or assigns."

A. died in the lifetime of the widow.

Held, that upon his death *B.* acquired an indefeasible vested interest in the whole fund.

Scurfield v. Howes, 3 Bro. C. C. 90, approved. *White v. Baker.* 55

2. A testator gave his real and personal estate upon trust as to the income for his brothers *E.* and *C.* or the heirs of their bodies, and declared that if either brother should die leaving heirs of his body, then the share of such brother should descend to such heirs, but if one brother should die without lawful issue then the whole income should be paid to the surviving brother, or in case

of his death also to his lawfully begotten heirs; but in case both brothers should demise without issue lawfully begotten, then the whole property should be divided among the testator's nearest of kin. And the testator appointed executors, with power to appoint other executors, as to them might seem fit, also with full power to get in and receive all monies or securities for money, and to sell, dispose of and convert into money all other his real and personal estate, either by public auction or private contract, as to them should seem meet.

Held, affirming the decision of Vice-Chancellor *Stuart*, that there was an effectual gift over of the personality to the next of kin in the event of *E.* and *C.* dying without leaving issue at their respective deceases.

Per the Lord Chancellor. Whether the 29th section of the Wills Act (7 Will. 4 & 1 Vict. c. 26) applies in the case of a gift over of personality which is included along with realty in a preceding gift which creates, without implication from the gift over, an estate tail in the realty, *quære.*

Held, reversing the decision of the Vice-Chancellor, that there was no conversion of the real estate into personality from the death of the testator.

Held also, that the brothers took the real estates as tenants in common in tail, with cross remainders in tail, with remainder

to the next of kin in fee. *Greenway v. Greenway.* Page 128

3. A testator gave his residuary estate upon trust, in case he left no child him surviving, for his wife for life, if she should so long continue his widow, but if she should marry again, upon trust to pay one-half of the dividends, and after her death upon trust to pay the whole thereof to the testator's brother and sister during their joint lives, equally to be divided, and after the decease of either of them the said brother and sister to pay the same wholly to the survivor for life, and after the decease of "every of them" his wife, brother and sister, the testator declared that the trust fund and the dividends thereof were to be held in trust for the children of the brother.

Held, that a moiety of the income accruing due after the second marriage of the widow and between the death of the survivor of the brother and sister and that of the widow (who survived them) neither belonged to the widow nor was undisposed of, but belonged to the brother's only child. *Brown v. Jervis.* 168

4. Testator gave freehold and leasehold property in trust for his widow for life, with remainder to his niece for life, and on her decease for all and every the child and children of the niece and for their respective heirs, executors and administrators, as tenants in common, the said children to be-

come beneficially interested on the death of their parent.

Held, that the children of the niece took vested interests on their respective births. *M'Lachlan v. Taitt.* Page 449

5. Disposition by a codicil of "all my real and personal estate and effects," *held*, on the context, not to include a fund of personal estate specifically disposed of by the will.

A testator bequeathed a fund to his nephews and nieces who should be living at his death, and directed that, in case of the death of any of them before receiving their respective shares, the share or shares of them, her or him so dying should go to the survivors.

Held, by Vice-Chancellor *Kindersley*, that the share of a niece was divested by her death within a year after the testator's death; but per the Lord Justice *Turner, semblé*, an inquiry ought to have been directed at what time the fund could have been paid over. *In re Arrowsmith's Trusts.* 474

6. A testator devised property to *A.* for life, remainder to *B.* and *C.* in fee upon trusts, and appointed *A.*, *B.* and *C.* his executors. By a codicil he revoked the appointment of *B.* to be a trustee and executor, and appointed *A.*, *C.* and *D.* trustees and executors, as fully and effectually to all intents and purposes and in all respects as if they had originally by his will been appointed to be the trustees and executors thereof.

Held, that the legal estate passed to *A., C. and D. Re Turner.* Page 527

7. An officer in the army by his will, made on his way to *England*, on sick leave, after bequeathing two small legacies to a non-commissioned officer and private of his regiment, and directing his portmanteau, carpet bag and sea chest to be sent to his father's residence in *England*, begged that, after those sums and other necessary expenses had been provided for, the remainder of his money and effects might be expended in purchasing a suitable present for his godson, *H. F. D.* (then a child of a year old), son of the paymaster of the regiment:—*Held*, that the residue of the testator's personal estate, consisting of reversionary interests in certain sums of stock, did not pass to his godson. *Bor-ton v. Dunbar.* 338

See ANNUITY.

PORTIONS.

CONSTRUCTIVE FRAUD.

Where a widower married the sister of his deceased wife:—*Held*, that the relation thus constituted imposed upon the widower, claiming the benefit of a settlement made on him by his wife's sister, the onus of showing that at the time of entering into the transaction she was fully, fairly and truly informed of its character and of her legal status.

Such a marriage and consequent cohabitation *held* not a sufficient

consideration to support a conveyance by the wife's sister of her property to the widower absolutely. *Coulson v. Allison.* Page 521.

CONSTRUCTIVE TRUST.

See LYING BY.

CONTINGENT LIABILITY.

See LEASEHOLDS.

CONTRIBUTORY.

Although a shareholder in an abortive company (the shares in which pass by the delivery of scrip certificates) may transfer his shares to an insolvent, for the purpose of getting rid of liability, the transaction must be a real one and not a false or hollow contrivance.

Whether a bona fide transfer made some time after a petition for winding up the company under the Winding-up Acts has been filed and advertized would be valid, *quære?* *In re The Mexican and South American Company. Costello's Case.* 302

See SHARES, 2.

CONVERSION.

See CONSTRUCTION, 2.

COPYHOLD.

The lord may drive carriages along a tramway under copyholds of the manor, for the purpose of working mines within the manor, but not of working mines beyond its limits, and a bill will lie for an injunction at the suit of a copyholder to restrain the lord from using the tramway for the latter purpose;

nor is it an objection to such a bill that the copyholder is not in possession of the surface, but has let it to a tenant. *Bowser v. MacLean.* Page 415

COSTS.

See CHARITY, 2.

EXECUTOR OF TRUSTEE.

LANDS CLAUSES ACT, 1.

LUNACY, 1, 2, 3.

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VENDOR AND PURCHASER.

COVENANT.

See LEASE.

CREDITORS' SUIT.

T. and *G.* were partners in building an hotel. *G.* bought the share of *T.*, who had conducted the building, and agreed to pay all the expenses. *G.* died, and at his death 356*l.* was due from him to *T.* in respect of bills which *T.* had paid for the building. A decree was made to administer *G.*'s estate. *T.* carried in a proof for the 356*l.* along with 82*l.* which he had paid since *G.*'s death. The 356*l.* was allowed and paid, the 82*l.* disallowed, and the estate was distributed. After this *T.* was obliged to pay further bills for the building, and filed a bill against the residuary legatees and devisees of *G.* to recover these sums and the 82*l.*

Held, by the whole Court, that the suit was maintainable as regarded the sums paid since the certificate.

Held, by the Lords Justices, the Lord Chancellor doubting, that it not appearing on what ground the 82*l.* had been disallowed, the Plaintiff had not lost his rights as to that sum.

Held, that the executor was not a necessary party to the suit. *Thomas v. Griffith.* Page 555

DECREE.

See PRACTICE, 4.

(Inrolment of).

See INROLMENT OF DECREE.

(Service of).

See PRACTICE, 5.

DEBTS (Proof of).

See CREDITORS' SUIT.

DEVISE.

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See CONSTRUCTION, 6.

DIRECTORS.

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DIVORCE.

See FRAUD.

EPISCOPAL AND CAPITULAR ESTATES ACT.

See LANDS CLAUSES ACT, 2.

EQUITABLE ASSIGNMENT OF CHATTELS.

See EXECUTION.

EQUITY TO A SETTLEMENT.*See WIFE.***ESTATE TAIL.**

Although a conveyance by a tenant in tail without a disentailing assurance will in general pass the fee, only determinable by the entry of the issue inheritable under the entail, yet the conveyance under the 1 Geo. 4, c. 119, by a tenant in tail who was an insolvent debtor, was held to be, without any such entry, defeated by a statutory conveyance under a subsequent bankruptcy, such statutory conveyance not operating like a recovery by way of confirmation of the previous conveyance.

An insolvent debtor in 1825 took the benefit of the then Insolvent Debtors' Act, (1 Geo. 4, c. 119,) and executed the usual conveyance and assignment of all his estate and effects to the provisional assignee in insolvency, but did not include in his schedule or disclose to the provisional assignee an interest to which he was entitled as tenant in tail in remainder, expectant on the death of his father, in certain real estate. The father died in 1826, and in 1829, the insolvent conveyed his estate tail by way of mortgage, and afterwards became bankrupt, when his estate tail was in 1834 barred by the Commissioner by a deed, in which the mortgagees joined:—*Held*, that the interest of the provisional assignee in insolvency in the estate ceased on the death of the insol-

vent in 1844, and that the estate belonged to the mortgagees and assignees in bankruptcy. *Sturgis v. Morse.* Page 223

ESTOPPEL.*See PORTIONS.***EVIDENCE.**

A letter written by a deceased solicitor, purporting to act as the solicitor of a particular individual, *held* not receivable in evidence, as having been written by the authority of that individual, on proof merely that there was such a solicitor in practice at the time, that the letter was in his handwriting, and that it came from the custody of the person to whom it purported to be addressed; and *held* that, in order to render the letter receivable, it must be proved aliunde that the writer had been duly authorized by the individual for whom he professed to act as solicitor.

Where bills of costs of a deceased solicitor to trustees introduced the name of the cestui que trust as having been personally present when the business was transacted, and the bills had been paid by the trustees and allowed in their settlement of accounts with the cestui que trust, *held* that the bills were admissible in evidence against the cestui que trust in a suit instituted by him upwards of twenty years afterwards against the trustees. *Bright v. Legerton.* 606

EXECUTION.

Where equitable assignees of chattels to be subsequently acquired had neglected to perfect their title to the chattels by any act tantamount to taking possession before the chattels were taken under an execution: *Held*, that the title of the execution creditor was to be preferred. *Holroyd v. Marshall.*

Page 596

EXECUTOR.*See LEASEHOLDS.***EXECUTOR OF TRUSTEE.**

The executrix of a deceased and sole trustee having declined to receive and pay the dividends of a sum of stock left standing in the name of the trustee, the cestui que trust filed a bill against her for the appointment of new trustees, a transfer of the trust fund and payment of a dividend. *Held*, that the executrix was entitled to her costs out of the fund. *Legg v. Mackrell.*

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EXECUTORY DEVISE.*See WASTE.***EXONERATION.***See MORTGAGE.*

— — —

FIDUCIARY RELATION.*See CONSTRUCTIVE FRAUD.***FOLLOWING TRUST MONEY.**

Two provisionally registered projected railway companies had the

same finance committee, who, in 1845, transferred sums amounting to 17,000*l.* from the account of one to that of the other. The directors of the latter company, without authority, paid 10,000*l.* part of the above amount, as a deposit in respect of an unauthorized contract to purchase canals from certain canal companies, and afterwards, in 1846, repaid to the other company 14,200*l.* In 1849 both companies were ordered to be wound-up under the Winding-up Acts. In 1850 the official manager of the borrowing company sued in equity the canal companies for the 10,000*l.*, and obtained a decree for payment of that amount, but being unable to enforce payment, assigned the benefit of the decree for 7,300*l.*, which was applied partly in payment of debts of the borrowing company, and partly in payment of costs. In 1858 the official manager of the lending company claimed from the official manager of the borrowing company the difference between the 17,000*l.* and the 14,200*l.* *Held*:—

1. That this balance might be traced and identified as part of the 7,300*l.* received as the consideration for the assignment of the benefit of the decree.

2. That it was payable to the claimant in full.

3. That length of time and change of circumstances, and absence of interference on the part of the lending company in the suit

against the canal companies, constituted no defence. *Ernest v. Croysdill.* Page 175

FORFEITURE.

See LEASE.

FRAUD.

Non-disclosure of antenuptial incontinence on the part of a wife held not to be such a fraud upon the husband as to entitle him to set aside a settlement made upon the marriage.

But, *semble*, that adultery, committed before separation, will invalidate a separation deed.

The Court of Chancery has no jurisdiction to deprive an adulteress, whose marriage has been dissolved, of any benefit under the settlement made upon the marriage.

The circumstance of a wife having induced her husband to execute a deed of separation, in contemplation of a renewal of the illicit intercourse, *held* sufficient to invalidate the deed. *Evans v. Carrington.* 481

See BANKRUPTCY, 2.

CONSTRUCTIVE FRAUD.

FRAUDULENT PREFERENCE.

See BANKRUPTCY, 1.

GIFT OVER.

See CONSTRUCTION, 3.

HUSBAND AND WIFE.

See WIFE.

INJUNCTION.

Where an injunction is granted until answer "or further order," it is not dissolved ipso facto by the defendant's putting in a sufficient answer, but remains in force until it is discharged by order of the Court, the practice in this respect not being altered by the stat. 15 & 16 Vict. c. 86. *Ooddeen v. Oakley.* Page 158

IMPLICATION.

See CONSTRUCTION, 6.

INCONTINENCE.

See FRAUD.

INCUMBRANCER.

See PRACTICE, 3.

INROLMENT OF DECREE.

On the 14th June the docket of a decree dismissing the Plaintiff's bill was deposited with the Clerk of Records and Writs for inrolment, and on the same day forwarded to the office of the secretary of the Master of the Rolls, who signed it on that day. On the 15th June a caveat was lodged at the office of the secretary of the Master of the Rolls, where both the docket and the caveat remained till the 19th, when the docket signed by the Master of the Rolls was returned to the

Clerk of Records and Writs, who procured the Lord Chancellor's signature to be adhibited thereto on the 20th June :—*Held*, that the caveat came too late to prevent the inrolment. *Ricketts v. Martin.*

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INSOLVENCY.

An insolvent in 1849 took the benefit of the 1 & 2 Vict. c. 110, and a judgment was entered up against him, pursuant to the provisions of that act. After his death a bill was filed by a creditor, who was also the assignee under the insolvency, to administer the assets of the insolvent. *Held*, that the bill was not demurrable on the ground merely, that it did not allege either danger to the assets of the deceased, or that application had been made for the sanction of the Insolvent Debtors Court to the suit. *Galsworthy v. Durrant.*

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See ESTATE TAIL.

PLEADING, 3.

POWER OF APPOINTMENT.

INTERROGATORIES TO AMENDED BILL.

See PRACTICE, 2.

JOINT-STOCK COMPANY.

A company was established for the purpose of building an hotel, "the carrying on the usual business of an hotel and tavern therein, and the doing of all such things as are incidental or otherwise con-

ducive to the attainment of the above objects." The company built an enormous hotel, containing 317 rooms. Before it was opened the directors, with the assent of a majority of the shareholders, agreed to let a portion of it, containing 169 rooms, unfurnished, to the *India Board*, for offices, at the rent of 6,000*l.* a year, for the term of three years, with an option to the Board to extend it to five years. The directors also agreed to make alterations for that purpose, which it was estimated would cost about 2,000*l.*, and cause a further expense in restoring the rooms to a state fit for hotel purposes. It was established that this agreement was not entered into with a view to the permanent employment of part of the premises for purposes not authorized by the constitution of the company, but was adopted as an interim measure, because the directors believed that the whole of so large a building could not safely and advantageously be opened as an hotel at first, and because they had not capital to open the whole at once :—*Held*, by the Lord Justice *Knight Bruce*, affirming the decision of Vice-Chancellor *Wood*, the Lord Justice *Turner* dissenting, that the agreement was not ultra vires, and that the Court ought not to interfere. *Simpson v. The Westminster Palace Hotel Company.*

Page 141

See BANKRUPTCY, 7.

SHARES, 2.

JUDGMENT.

The proceeds of a call made under the Winding-up Acts to provide for the payment of a debt of the company may be attached in the hands of the Official Manager, under the Common Law Procedure Act, to answer a judgment against the creditor. *In re The Warwick and Worcester Railway Company, Pritchard's Claim.* Page 354

JURISDICTION.

See WINDING-UP.

LACHES.

The doctrine that where there is an express trust lapse of time is not material, *held* not to apply in a case in which there had been gross laches on the part of the cestui que trust. *Bright v. Legerton.*

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See LYING BY.

LANDS CLAUSES ACT.

1. An estate stood limited to *B.* for life, with remainder to his first and other sons successively in tail, remainder to *B.* in fee. *B.* made his will, devising all his real estate in strict settlement. After the date of *B.*'s will a company purchased from him part of the estate under the powers of the Lands Clauses Act, and paid the purchase-money into Court. *B.* died without issue: — *Held*, that the company must pay the costs of investing the purchase-money in

real estate, to be settled to the uses of the will.

Whether if *B.* had died intestate his heir at law would not have been entitled to an investment in land at the expense of the company, *quære? Re de Beauvoir.* Page 5

2. A bishop presented a petition to have monies which had been paid into Court by several railway companies for lands taken from the see applied in buying up a lease of other land belonging to the see: — *Held*, that taking together the Lands Clauses Consolidation Act and the Episcopal and Capitular Estates Act, the companies must pay costs in the same way as if the purchase had been of freehold lands.

Held also, that the petition ought not to have been served on the Ecclesiastical Commissioners, but their consent out of Court obtained and proved, and that the companies ought not to pay the costs of their appearance.

Held also, that the costs ought to be borne by the companies in equal shares, except the costs of the ad valorem stamp on the assignment, which ought to be borne by them rateably according to the amounts which they contributed respectively to the purchase-money. *Ex parte Bishop of London.*

14

LEASE.

Where, in a suit for specific performance of an agreement for a farming lease, there is a conflict of evi-

dence on the question whether the Plaintiff has committed breaches of covenant which would have created a forfeiture of the lease if granted, the Court will decree specific performance, directing the lease to be antedated, so as to enable the Defendant to try the question at law. But such a decree will not be made unless the conflict of evidence leaves it in doubt whether there has been any breach which would render it proper to refuse specific performance. A breach for that purpose must be serious and wilful. Import of a covenant to farm on the four-course system. *Rankin v. Lay.* Page 65

LEASEHOLDS.

On the sale of a leasehold before the passing of the act 22 & 23 Vict. c. 35, the purchaser covenanted to indemnify the vendor against the covenants of the lease. He bequeathed the leasehold to his widow and appointed her his executrix:—*Held*, that the act applied, and that the executors of the widow were at liberty to distribute her estate without setting apart any fund to provide against the liability under the covenants. *Re Green.* 121

“ LEAVING.”

See CONSTRUCTION, 2.

LIBERTY TO APPLY.

See PRACTICE, 4.

LIEN.

Foreign correspondents of a *London* firm direct the firm to purchase for them Mexican Bonds to a specified amount, at a specified price, and to hold the bonds at the disposal of the correspondents. The *London* firm make and notify the purchase, and write to the correspondents that they will, until further order, retain the bonds for safe custody. *Held*, that the letters constituted a special contract sufficient to exclude a general lien on the part of the *London* firm, if they would otherwise have been entitled to any.

Semblé, that a general lien cannot be claimed according to any general law of principal and agent, but only as arising from dealings in some particular trade, as to which a custom to that effect has been established. *Bock v. Gorissen.* Page 434

LUNACY.

1. A lunatic being tenant in tail of an undivided share of an estate, a decree for partition was made, which directed that the lunatic's costs should be raised by mortgage of the land allotted to her in severalty. On the completion of the partition the lands allotted to the lunatic were conveyed to her simply in tail, without any provision for raising the costs:—*Held*, by the Lords Justices sitting in Lunacy, that they had no jurisdiction to authorize the com-

mittee to mortgage the land for the purposes of raising the costs. *Re Bloomar.* Page 154

2. A lunatic died in *June*, 1853. In *February*, 1854, an order in lunacy was made, by which it was declared that the costs incurred in prosecuting the commission had been incurred for the benefit of the lunatic, and the bill was directed to be taxed. The taxation was completed in *February*, 1855, and after this the solicitor who had been employed in prosecuting the commission delivered for the first time a signed bill of costs. In *October*, 1860, the solicitor presented a petition to have his costs raised out of property of which the lunatic, who left issue, had been tenant in tail. *Held*, that under the proviso contained in 23 & 24 Vict. c. 127, s. 29, the application was too late.

Per the Lord Justice *Knight Bruce*, the time when the right to recover the costs accrued within the meaning of the proviso was the death of the lunatic.

Per the Lord Justice *Turner*, the right to recover, if it did not accrue at the death of the lunatic, accrued at the latest in *February*, 1854, when the costs were declared to have been properly incurred.

Whether, if the petition had been presented in time, the Petitioner could, under 23 & 24 Vict. c. 127, s. 9, have had the relief sought, *quare.*

A copyhold property descended

in fee upon a married woman, subject to a covenant entered into by a former owner upon his marriage to surrender it to certain uses, under which, had the surrender been made, the married woman would have been legal tenant in tail. *Held*, that she had no equity to a settlement out of property so circumstanced. *Re Cumming.* Page 376

3. On a mortgage being paid off, the costs of obtaining a vesting order, rendered necessary by the lunacy of the heir-at-law of the mortgagee, were ordered to be paid by the mortgagor. *Re Jones.* 554

LUNATIC.
See MAINTENANCE, 1, 2.

LYING BY.

G. W., as administrator with the will annexed of his mother, was entitled to a mortgage of a colliery, *G. W.*, *C. W.* and *N.* being entitled in equal shares to the mortgage money. *G. W.* was also receiver of the colliery and other estates held under the same title in a suit in which the title of the mortgagor was disputed, and to which *G. W.* was a party as representative of his mother. This suit was compromised in 1847, upon the terms that out of the profits of the colliery certain yearly sums should be paid to *Y.*, who claimed by a title paramount to the mortgage, and that, subject to those payments, 20,000*l.* should be raised out of the colliery and

paid to *G. W.* in satisfaction of the mortgage, and provisions were made for letting the colliery. In *February*, 1853, *G. W.* entered into an arrangement with *Y.* for the purchase from him of the colliery and some other property. Up to this time the colliery had been a very losing concern. In *May*, 1853, *N.* filed a bill to have the agreement of 1847 carried into effect, and in *June*, 1853, *C. W.* filed a bill to have it declared that *G. W.* had made the purchase of *February*, 1853, as a trustee for the persons interested in the 20,000*l.* In *July*, 1853, *G. W.* answered *C. W.*'s bill, setting out the principal particulars of the agreement of *February*, 1853. In *January*, 1854, *N.* filed a supplemental bill against *G. W.*, *C. W.* and *Y.*, treating the purchase as a purchase made by *G. W.* for his own benefit, and seeking to establish that it had the effect of postponing the yearly payments to *Y.* to the 20,000*l.* In *February*, 1855, *C. W.* allowed his bill to be dismissed for want of prosecution. In *April*, 1855, a decree was made in *N.*'s suit, establishing the priority of the annual payments over the 20,000*l.*, and giving directions for raising the 20,000*l.* In *June*, 1855, *G. W.* brought up *N.*'s rights under this decree. *C. W.*, in *October*, 1857, filed a second bill, to have it established that the purchase of 1853 was made by *G. W.* as a trustee for the persons interested in the 20,000*l.*

Held, by the *L. J. Knight Bruce*, affirming the decision of *V.-C. Wood*, the *L. J. Turner* dissenting, that *C. W.* had, by his conduct, disentitled himself to the relief sought by his bill. *Whalley v. Whalley*. Page 310

MAINTENANCE.

1. Order made for the application of the income of a fund in Court for the maintenance of a person of unsound mind, without commission, though his property produced upwards of 200*l.* per annum. *Re Burke*. 124
2. An order cannot be made for the maintenance of a lunatic not found so by inquisition, unless proceedings have been taken for placing the property under the administration of the Court of Chancery. *Re Tayler*. 125
3. A legacy of 5,000*l.* was bequeathed to trustees, upon trust to pay and apply so much of the interest as they in their uncontrolled discretion should think necessary or expedient, yearly and every year from the time of the testator's decease until *A.* should attain thirty-two, in aid of the allowance which *A*'s father should or ought to make for that purpose, in order to prepare *A.* for his establishment in and to enable him to follow some profession or business, and subject thereto to accumulate the income of the 5,000*l.* until *A.* should attain thirty-two or die, whichever should first happen; and on *A.* attaining

thirty-two years to pay the interest of the 5,000*l.* and of the accumulated fund arising therefrom to *A.* during his life, so long as he should not have been found bankrupt, or taken the benefit of the Insolvent Acts or have assigned his estate for the benefit of, or have compounded with, his creditors for payment of less than the debts due to them respectively; and subject to the trust above mentioned, the 5,000*l.* and the accumulated fund were to be held in trust for the child or children of *A.* in manner therein mentioned, with a gift over in default of a child or children becoming entitled under such trust.

A., soon after attaining his majority, became involved in debt, and in consequence unable to provide for his wife and infant child or to pursue any profession or business. The Court directed a portion of the fund which had arisen from accumulations of surplus income to be applied in payment of his debts.

Power of trustees to resort for future maintenance to accumulations of dividends which would, if required, have been applicable to past maintenance. *Edwards v. Grove.* Page 210

MARRIAGE CONSIDERATION.

See SETTLEMENT.

MERCHANT SHIPPING ACT.

See SHIP.

Vol. II.

MINES.

See COPYHOLD.

LYING BY.

SUPPORT.

MISDESCRIPTION.

See VENDOR AND PURCHASER.

MORTGAGE.

A direction in a will that all the testator's just debts, funeral and testamentary charges and expenses should be paid and discharged by his executors as soon as convenient after his decease out of his estate, followed by a gift of all the testator's real and leasehold estates (which were subject to a mortgage) to trustees who, with his wife, were named also executors of his will:—
Held, not to be such an expression of contrary intention as to bring the case within the saving of the act 17 & 18 Vict. c. 113, and held, consequently, that the cestuis que trust under the will of the real estate and leaseholds took them cum onere. *Woolstencroft v. Woolstencroft.* Page 347

See LUNACY, 3.

NEGLIGENCE.

EXECUTION.

NEGLIGENCE.

A solicitor borrowed money from a client upon a mortgage of two properties, *A.* and *B.*, and handed over to him a quantity of title deeds in a parcel bearing a label stating it to contain the deeds re-

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lating to both properties. It in fact contained only the deeds relating to property *A.*; but the client, relying on the solicitor, never opened it. Shortly afterwards the solicitor sold property *B.* to the Defendant, who completed his purchase without any notice of the mortgage, and upon completion the title deeds were handed over to him. Several years afterwards the solicitor absconded, and the mortgagee then for the first time discovered that the deeds had not been delivered to him, and that the purchaser claimed a title to the property. *Held*, that the mortgagee had not been guilty of such negligence as to postpone his title to that of the purchaser.

A decree for foreclosure being made against the purchaser, at the suit of the mortgagee, who was a mortgagee only for a term, *held*, that the purchaser ought not to be directed to deliver up the deeds to the mortgagee. *Hunt v. Elmes.*

Page 578

See POWER OF ATTORNEY.

NOTICE.

See POWER OF ATTORNEY.

—

OCCUPANCY.

See SPECIAL OCCUPANCY.

OFFER IN BILL.

Where the Plaintiff, by his bill, seeking to charge the Defendant as constructive trustee of the lease of a farm of which he had been in

the occupation, prayed for an account of the profits made and received by the Defendant in carrying on the farming business, and offered to allow the Defendant, on taking such account, all such sums as had been advanced by the Defendant and were due to him for stock supplied for carrying on the farming business:—*Held*, that the Plaintiff was not at liberty to revoke this offer at the hearing, and instead of an account of profits to claim an occupation rent, merely by reason of a statement in the Defendant's answer, that while the Defendant had held the farm no profits had been made. *Kendall v. Marsters.*

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ORDER AND DISPOSITION.

See BANKRUPTCY, 1.

—

PARENTAL INFLUENCE.

A re-settlement, executed by a tenant for life and his son, who was tenant in tail in remainder, had been prepared by the father's solicitor, and the son had not had the advantage of independent professional advice, but it appeared that the son was well acquainted with and had been advised respecting the provisions of the deeds of re-settlement before they were executed by him, and that the transaction was a reasonable one and for the good of the family, and not upon the whole for the personal benefit of the father. *Held*, not a case for setting

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aside or altering the deed. *Jenner v. Jenner.* Page 359

PARENT AND CHILD.
See PARENTAL INFLUENCE.

PARTICULARS OF SALE.
See VENDOR AND PURCHASER.

PARTIES.
See CREDITORS' SUIT.
PLEADING, 1.

PARTITION.
See LUNACY, 1.

PAUPER.
See PRACTICE, 6.

PAYMENT FOR HONOR.
See BANKRUPTCY, 6.

PERPETUAL ANNUITY.
See ANNUITY.

PERPETUITY.
See CHARITY, 1.

PLEADING.

1. A testator in 1815 devised an estate to *A.* for life, remainder to his sons successively in tail, remainder to *B.* in tail, and in 1818 made another will, devising the estate to *A.* for life, remainder to his sons successively in tail, remainder to *C.* in tail. *Held,* that a decree establishing the will of 1818, made in a suit to which *B.* was not a party, but *A.* and his first son were parties, as representing the inheritance, was not binding

as between *B.* and *C.* *Arnold v. Bainbrigge.* Page 92

2. A substantial defence to the bill held available, though not expressly raised by the pleadings; the facts on which it rested being expressly alleged in the bill and answer and substantiated by the evidence. *Ormes v. Beadel.* 333
3. Bill by one of the creditors of an insolvent to recover property alleged to belong to the insolvent's estate, on the mere allegation that the assignee in insolvency refused to sue without an indemnity against the costs of the suit, and that the Plaintiff, through poverty, was unable to give such indemnity: *Held,* demurrable. *Davis v. Snell.* 463

See BANKRUPTCY, 1.

OFFER IN BILL.

PORTIONS.

A testator directed that an estate should be settled on *S. T.* for life, with remainder to his sons successively in tail, remainder to his daughters successively in tail, and that the settlement should contain a power to *S. T.* to charge the estate with any sum not exceeding 2,000*l.* for the portions of his younger children. *S. T.* by deed charged the estate with the sum of 2,000*l.* for the portions of his younger children, to be raised within three months after his decease, and to be equally divided between them. There were five younger children, daughters, two of whom died in *S. T.*'s lifetime

minors and unmarried, another attained twenty-one and died in his lifetime, and two attained twenty-one and survived him. *Held*, that the representatives of the daughter who attained twenty-one and died in the father's lifetime were entitled to a share in the fund.

Whether the representatives of the daughters who died minors in the father's lifetime were also entitled to shares, *quærre*.

Per the Lord Justice *Turner*, *semble*, they were not.

On the death of the father a moiety of the £,000*l.* was paid to one of the two surviving daughters, and interest on the other moiety was paid to the other surviving daughter for more than thirty years. *Held*, that this did not estop the owners of the estate from denying her right to receive so much as a moiety of the capital.

Remnant v. Hood. Page 396

POWER OF APPOINTMENT.
By a post-nuptial settlement, a fund was settled in trust for the husband for life, or until (among other events) he should become an insolvent debtor, with remainder to the wife for life, remainder to their children or issue, as the survivor should appoint, and in default of such appointment, from and after the several deceases of the husband and wife, or the sooner determination of the interests thereinbefore limited to them respectively, in trust for the children then living and the issue of deceased children then living. The husband's in-

terest ceased by his insolvency, and his wife afterwards died:—
Held, that the interests of the children and their issue in default of appointment thereupon became vested, and could no longer be varied by the execution by the surviving husband of his power of appointment. *Haswell v. Haswell*.

Page 456

POWER OF ATTORNEY.

In 1841 a client, before going abroad, gave a power of attorney to his solicitor in *England* to manage the whole of the client's property and concerns in *England* while he was abroad, and, generally, to do all other acts, deeds, matters or things whatsoever in or about the estates, property and affairs of the client, as amply as the client could do or have done.

In March, 1849, the attorney, professing to act under the power, borrowed 500*l.* upon deposit of a policy of assurance belonging to the client, and afterwards misapplied the money: *Held*, that whether the power of attorney per se authorized the raising of the money upon the security of the policy or not, yet, when coupled with a correspondence between the attorney and client showing that the latter, believing the power to have that effect, desired it to be so exercised when occasion should require, it precluded the client from disputing the validity of the mortgage.

Extent of general words in powers of attorney.

The circumstance of only one solicitor acting in a transaction does not constitute him the solicitor of both parties, so as to affect one with notice of facts known to the other.

The omission to require strict legal evidence of title before advancing money is not necessarily such negligence as would be attended with the same consequences as actual notice.

Actual payment of money to an attorney under a power not requisite to enable him to give a discharge. *Perry v. Holl.* Page 38

PRACTICE.

1. An affidavit, instead of being headed as usual, "We, A. B., C. D. and E. F., severally make oath and say," was headed "The joint and several affidavit of A. B., C. D. and E. F. We the said A. B., C. D. and E. F. say as follows." Leave to file it was refused. *Re Newton.* 3
2. After the Defendants to an original bill had answered the interrogatories, the Plaintiff amended his bill, adding fresh statements and new Defendants, but retaining most of the materials of the original bill. He then filed interrogatories, going through the whole of the statements of the bill as amended, and required each of the Defendants to answer all the interrogatories. *Held,* that an order made on the application of the original Defendants, that the interrogatories should be taken off the file, with liberty for the Plaintiff to file new interrogatories within a limited time, had been rightly made. *Drake v. Symes.* Page 81
3. A mortgagee of a devisee filed a bill to enforce his security, and obtained a decree containing an inquiry as to the incumbrances on the estate. Immediately afterwards a legatee, whose legacy was charged on the estate and had priority over the mortgage, filed his bill to have the legacy raised. *Held,* that the decree in the other suit was no bar to his proceeding with his suit, for that a prior incumbrancer is not bound to go in under a decree obtained by a puisné incumbrancer, but is at liberty to institute a suit of his own. *Arnold v. Bainbrigge.* 92
4. The ordinary direction in a decree that "any of the parties are to be at liberty to apply to the Court as they shall be advised." *Held,* not to extend to an application by the Plaintiff to be allowed costs, as to which there was no express direction given by the decree. *Kendall v. Marsters.* 200
5. Substituted service on a Defendant's solicitor in the cause of a decree for payment of money ordered on the ground that the Defendant was permanently resident out of the country, though he had not gone abroad to avoid service, but in the discharge of his duty as consul. *Griffiths v. Conper.* 208
6. An order under the 23 & 24 Vict.

- c. 149, s. 5, assigning to a pauper Defendant in custody under an attachment for want of answer a solicitor and counsel is of course. *Layton v. Mortimore.* Page 353
7. Where one of the Defendants had neither consented to an application for a transfer of the cause from one branch of the Court to another, nor had been served with it, the application was refused, though all the other parties consented. *Bond v. Barnes.* 387
8. Leave to a person not a party to the record to present a petition of appeal may be granted either upon motion or petition ex parte. *Parmiter v. Parmiter.* 526
9. The Plaintiff obtained an interlocutory order restraining the Defendant from suing out execution or taking any proceedings on a judgment at law until further order. The Plaintiff's bill was afterwards dismissed at the hearing, upon which the Defendant issued an eletit and placed it in the hands of the sheriff. The Plaintiff appealed from the order of dismissal, and moved before the Court of Appeal to restrain the Defendant, who resided out of the jurisdiction, from enforcing his eletit pending the appeal. The Court made an order that the sheriff should not proceed on the eletit until further order, and named an early day for hearing the appeal, reserving the costs of the application.
- Semble*, the application did not come within Consol. Ord. VI. 12, but was properly made to the

Court of Appeal in the first instance.

Per the Lord Justice *Knight Bruce*. There is no inflexible rule that a person applying to stay proceedings under a decree pending an appeal must pay the costs of the application. *Earl of Shrewsbury v. Trappes.* Page 172

PRINCIPAL AND AGENT.

See LIEN.

POWER OF ATTORNEY.

PRIORITY.

See NEGLIGENCE.

PROOF OF DEBTS.

See CREDITORS' SUIT.

PROTEST.

See BANKRUPTCY, 6.

PUBLIC COMPANY.

See FOLLOWING TRUST MONEY.

LANDS CLAUSES ACT, 1, 2.

SHARES, 1.

RAILWAY COMPANY.

See SUPPORT.

RECTIFICATION.

See PARENTAL INFLUENCE.

REMOTENESS.

See CHARITY, 1.

REPUTED OWNERSHIP.

See BANKRUPTCY, 1.

RESIDUE.

See CONSTRUCTION, 7.

SALE.*See TRUSTEE.***SCHEME.***See CHARITY, 2.***SCHOOL.***See CHARITY, 2.***SEPARATION DEED.***See FRAUD.***SERVICE OF DECREE.***See PRACTICE, 5.***SETTING ASIDE DEED.***See PARENTAL INFLUENCE.***SETTLEMENT.**

Assets of a testator, consisting of personality which could be identified, were settled *bonâ fide* upon the marriage of his daughter and residuary legatee. *Held*, that they thereupon ceased to be liable to subsequently accruing claims in respect of breaches of covenants which had been entered into by the testator, but of which the parties to the settlement had no notice when they executed it. The limitations and covenants in a marriage settlement are not severable, as being in part only supported by the consideration of marriage, *semble*. *Dilkes v. Broadmead*.
Page 566

*See FRAUD.***SETTLEMENT (Equity to).***See WIFE.***SHARES.**

1. Shares in a railway company, which had demised its undertaking to another railway company for 1,000 years, at a fixed annual rent, secured by power of re-entry, with an option to the lessees to become purchasers of the line: *Held*, to retain their quality of pure personal estate, and not to be an interest in land within the Statute of Mortmain. *Taylor v. Linley*.
Page 84

2. *G.*, a shareholder in a completely registered company, being in prison, two of the directors, being desirous to procure his discharge, entered into an agreement with *B.*, one of his creditors, by which *B.* agreed to accept 1,500 shares in part payment of his debt, and to consent to *G.*'s discharge; and the two directors stated that they were authorized by *G.* and the company to transfer the shares, declared the shares to be transferable by delivery, and agreed that if it should appear that the shares could not be legally vested in *B.*, without his executing the deed of settlement, they would pay him 1,500*l.* They handed over to him scrip certificates for 1,500 shares, which described the company as only provisionally registered, and purported to be transferable by delivery. The directors placed *B.* on the register of shareholders without his knowledge, and in the register of transfers they entered the shares as transferred to him by *G.*, but it was not shown that any deed of

transfer had ever been executed, and he never executed the deed of settlement, or any deed of accession to it. An order was afterwards made for winding up the company:—*Held*, that, inasmuch as the shares in the company were not transferable by delivery, and could not be vested in *B.* without his executing the deed of settlement, *B.*, in the absence of conduct estopping him from disputing his being a shareholder, was not liable to be placed on the list of contributories. *Bunn's Case.* Page 275

See CONTRIBUTORY.

SHIP.

Although the Merchant Shipping Act, 1854, contains no provision negativing the validity of a mortgage made otherwise than according to the terms of the act, the whole scope of the act is to that effect, and an equitable mortgage is still invalid. *The Liverpool Borough Bank v. Turner.* 502

SOLICITOR.

W. employed *F.* as his solicitor from 1855 to 1859, and became indebted to him for costs and cash advances. In July, 1858, *W.* gave to *F.* a security upon his furniture, farming stock, &c., to secure all monies due or to become due, with an immediate power of sale. In January, 1859, *F.* sent in to *W.* an unsigned bill of costs and cash account, and in March pressed for payment and threatened to enforce

his security. *W.* then employed another solicitor, and a correspondence went on till May. *F.*, on 17 May, gave notice that if the money was not paid on that day he should take possession under his security, and he accordingly did so. *W.* then paid the amount under protest. The bill of costs contained items to a considerable amount subsequent in date to the security, and over charges were shown. Many of the vouchers for the items in the cash account, though applied for, had not been produced till the day of payment. *Held*, that *W.* was entitled to an order for taxation. *Re Foster, Ex parte Walker.* Page 105

See LUNACY, 2.

POWER OF ATTORNEY.

SOLICITOR AND CLIENT.

See EVIDENCE.

SPECIAL OCCUPANCY.

There may be a special occupant of an equitable estate pur autre vie. Leasehold estates pur autre vie were devised in trust for *A.*, his heirs, sequels in right, executors, administrators and assigns. *A.* survived the devisor, and, being illegitimate, died without heirs and intestate, living the cestuis que vie. *Held*, that the devised estates passed under the Wills Act, 7 Will. 4 & 1 Vict. c. 26, to *A.*'s administrator (the nominee of the Crown). *Reynolds v. Wright.* 590

SPECIFIC PERFORMANCE.*See LEASE.***STATUTES.**

14 & 15 Vict. c. 104 (Episcopal and Capitular Estates Act).

See LANDS CLAUSES ACT, 2.

17 & 18 Vict. c. 113 (*Locke King's Act*).

See MORTGAGE.

22 & 23 Vict. c. 35 ("An Act to further amend the Law of Property and to relieve Trustees").

*See LEASEHOLDS.***STAYING PROCEEDINGS.***See PRACTICE, 9.***SUBSTITUTED SERVICE.***See PRACTICE, 5.***SUPPORT.**

A railway company was empowered by its special act to take lands, but the minerals were to be reserved to the vendor, who was to be at liberty to work them, causing no damage or obstruction to the railway; and by another clause of the act it was provided that, on working up to within twenty yards of any masonry or building of the company, the owner of the minerals might require the company to purchase the minerals within that range, or, on their neglect to do so, might work them in the usual and ordinary way, doing no avoidable damage.

The company in 1837 purchased land from the Defendant under their compulsory powers, for the Vol. II.

purpose of erecting a bridge, which was accordingly built and completed in 1838. On the lessee of the minerals from the vendor notifying to the company his intention of renewing the working of the minerals, which had been abandoned since 1791:—*Held*, a proper case for granting an injunction—as to land within the twenty yards, against working so as to cause damage until the conditions of the act had been satisfied; and as to other workings beneath or adjoining the company's lands, against working so as to affect the stability of the bridge, or the railway or other works of the company.
North-Eastern Railway Company v. Elliott. Page 423

SURVIVORSHIP.*See CONSTRUCTION, 1.***TAXATION.***See SOLICITOR.***TITLE DEEDS (Possession of).***See NEGLIGENCE.***TRANSFER OF CAUSE.***See PRACTICE, 7.***TRUST.***See LACHES.***TRUSTEE.**

The fact that a trustee for sale by public auction or private contract

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has not promoted competition by asking one of two persons proposing to purchase by private contract to bid higher before closing with the rival bidder: *Held*, not to be a ground for setting aside or cancelling the contract.

The practice adopted at sales by auction under the decree of the Court, of opening the biddings after a sale, not to be extended to sales by trustees under a power of sale conferred upon them. *Harper v. Hayes.* Page 542

See MAINTENANCE, 3.

TRUSTEE ACT, 1850.

See VESTING ORDER.

TRUSTEE, EXECUTOR OF.

See EXECUTOR OF TRUSTEE.

TRUST FUND, FOLLOWING.

See FOLLOWING TRUST MONEY.

ULTRA VIRES.

See JOINT-STOCK COMPANY.

VENDOR AND PURCHASER.

A property situate in a town, and comprising a warehouse with a small steam-engine, was described in particulars of sale under a decree as "well supplied with water." The property was well supplied with water, but only from the waterworks of the borough, and by payment of water rates, there

being no natural supply. The manufactories in the town were generally supplied with water from wells upon the properties themselves, though small steam engines in warehouses frequently were not:—*Held*, that there was a misdescription, and that a purchaser who purchased on the faith of the description in the particulars, without knowing the real state of the case, could not be compelled to complete his purchase without compensation.

The application of the purchaser for compensation was refused with costs in the Court below, but on appeal he was held entitled to be paid his costs, both of the proceedings in the Court below and in Chambers, and his costs of the appeal motion. *Leyland v. Illingworth.* Page 248

VESTING.

See CONSTRUCTION, 4, 5.

VESTING ORDER.

A sum of stock was standing in the name of a person of unsound mind, part of such stock being his own beneficially and part of it being vested in him as trustee. The Court had made an order appointing new trustees, and vesting in them the right to call for a transfer of the trust stock and to receive the arrears of dividends. It was found that an order in this form could not be acted on as to the arrears of dividend, since the bank could not pay arrears on

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part of a sum. The Court therefore varied the order, so as to enable the new trustees to receive the past dividends on the whole sum of stock and to retain for the purposes of the trust that portion which had accrued due in respect of the trust stock. *Re Stewart.*

Page 1

WAGERING.

See BANKRUPTCY. 5.

WASTE.

Devise in fee subject to an executory devise over in the event of his not leaving issue living at his decease:—*Held*, dispusniable for legal but not for equitable waste. *Turner v. Wright.* 234

WIFE.

Where a married woman was entitled under a will to a legacy charged on land, with power of entry and receipt of rents and profits: *Held*, that this power did not deprive the legacy of its equitable character, so as to enable the husband to assign it free from the wife's equity to a settlement, but that the Court would, at the suit of the wife, and on the devisee paying the legacy into Court, restrain the husband's assignee from enforcing the legal remedies

for the recovery of the legacy. *Duncombe v. Greenacre.* Page 509.

WILL.

See ANNUITY.

CONSTRUCTION, 1, 2, 3, 4, 5, 6, 7.
PORTIONS.

WINDING-UP.

Before the passing of the Joint Stock Companies Act, 1856, a company was registered with unlimited liability. It was afterwards registered under the act with limited liability. *Held* that the Court of Chancery had no jurisdiction to wind up the affairs of the company.

The restriction as to the time of appealing under the Winding-up Act of 1848 does not apply to an appeal from an order on the ground of want of jurisdiction to make it.

The Court of Bankruptcy has no jurisdiction to rehear a petition so as to extend the time for appealing. *Re the Plumstead, &c. Water Company.* 20

See BANKRUPTCY. 7.

CONTRIBUTORY.

FOLLOWING TRUST MONEY.

SHARES, 2.

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See PORTIONS.

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